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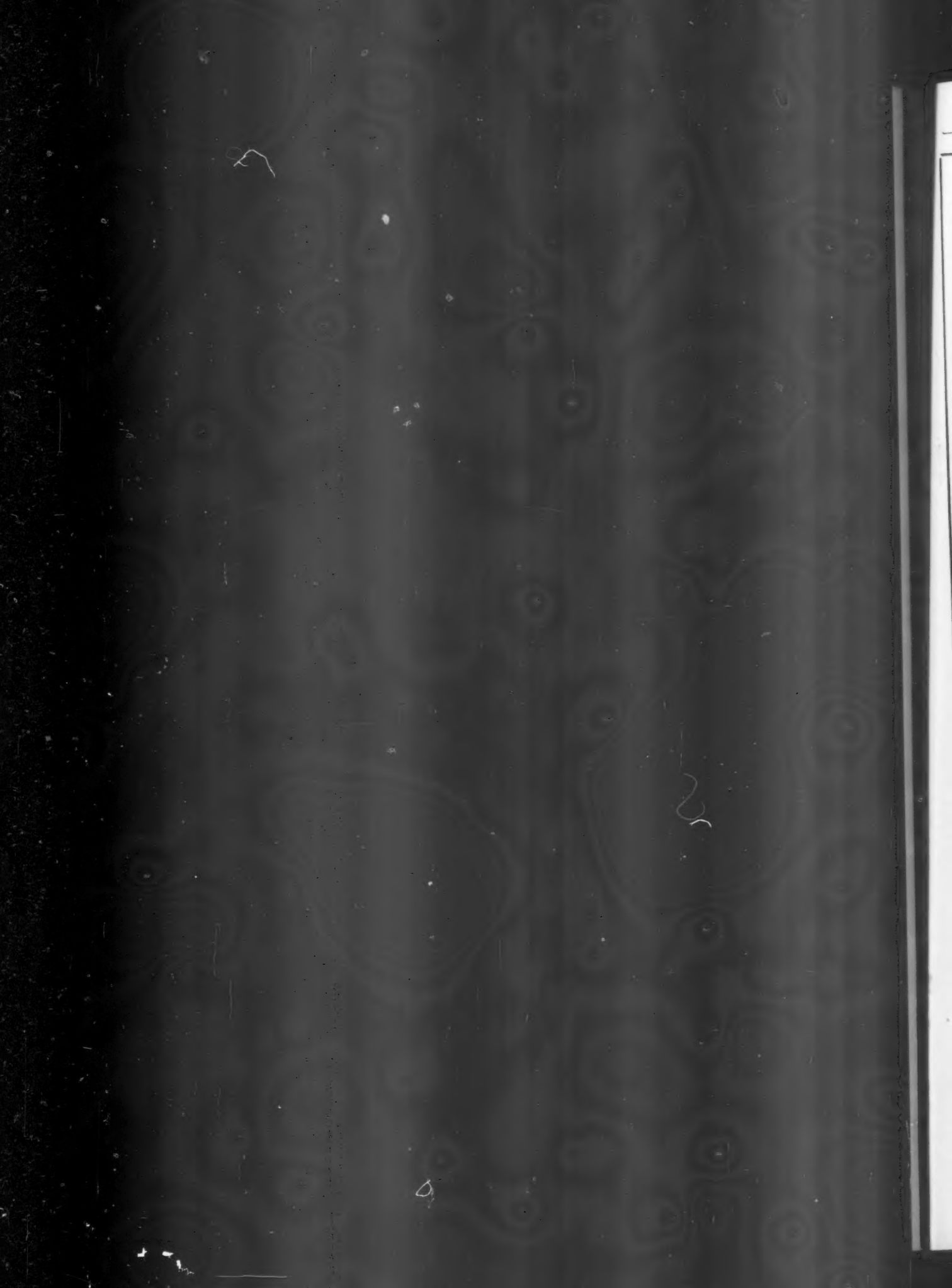

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AMERICAN BAR ASSOCIATION
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Next Annual Meeting to Be Held at Grand Rapids

THE Executive Committee of the Association held its regular mid-winter meeting at Tampa, Florida, on January 17 and 18. It selected Grand Rapids as the place for the next annual meeting and fixed August 30-September 1 as the date.

Apart from the extremely good facilities which Grand Rapids offers for the meeting, it is felt that the selection will be generally approved as it will give members in attendance an opportunity to drop by Chicago and see The Century of Progress Exposition, which will be open at that time.

The regular routine business of the Association was transacted. A number of recommendations made by various committees were taken up and disposed of. Mr. Paul F. Good of Lincoln, and Mr. Clarence T. Spier, of Omaha, Neb., were elected to the Nebraska State Council. Mr. Roderick N. Matson of Cheyenne was elected to the Wyoming Council, and Mr. Edward J. Dempsey of Oshkosh to the Wisconsin Council. The elections were to fill vacancies existing on those bodies.

The Executive Committee will hold its next meeting at Washington May 1-3.

American Bar Association Broadcasts Begin February 12th

ENTHUSIASTIC responses from Bar Associations all over the country indicate the interest of the profession in the forthcoming series of broadcasts, which have been arranged by the American Bar Association under the auspices of the National Advisory Council on Radio in Education.

The program has now been completed and, in addition to those speakers mentioned in last month's issue of the JOURNAL, will include Colonel William J. Donovan, of New York, former Assistant Attorney General who, as an officer of the Radio Council, will introduce President Martin; Judge Samuel Seabury, Counsel for the New York City Investigation Committee, who will speak on "The Lawyers' Influence on Public Opinion"; Professor Edson R. Sunderland, of the Law School of the University of Michigan, who will speak with Mr. Henry W. Toll on "Reforming the Law Through Legislation"; and Judge Learned Hand, of the U. S. Circuit Court of Appeals, who will speak with Professor Felix Frankfurter on the subject "How Far Is a Judge Free in Rendering a Decision?"

As has been previously announced, the radio time has been donated by the Columbia Broadcasting System.

The programs will be given on Sundays from 6:00 to 6:30 P. M., Eastern Standard Time, over the Columbia network, and the first four addresses will be as follows:

February 12.—Clarence E. Martin, President of the American Bar Association, will speak on "The American Bar, Its Past Leaders and Its Present Aims." He will be introduced on behalf of the National Advisory Council on Radio in Education, by Mr. William J. Donovan, former Assistant U. S. Attorney General.

February 19.—Roscoe Pound, Dean of the Harvard Law School, will speak on "Training for the Bar."

February 26.—James Grafton Rogers, Assistant Secretary of State, will be interviewed by a young man in search of a profession, on the subject "Shall I Become a Lawyer?"

March 5.—Judge Samuel Seabury, Counsel of the New York City Investigation Committee, who

will speak on "The Lawyer's Influence on Public Opinion."

Copies of pamphlets giving the entire program will be furnished upon request to the American Bar Association.

Arrangements have been made with the University of Chicago Press for printing and distributing each broadcast as it is given for a price of 15c per copy or $2.00 for the complete set of broadcasts, if a sufficient number of orders are secured. Since this service is for the particular edification of the layman, it was suggested that some lawyers might like to have copies sent to certain of their clients, and a special quantity price has been made to provide for this. The Chicago Press is not making any profit from these reprints, this entire service being given at cost. The beneficial effect which widely circulated radio addresses of this nature will have on the public thinking concerning our profession will be greatly enhanced if the addresses in permanent printed form are widely circulated among the public, and it is, therefore, to be hoped that lawyers will take advantage of the opportunity presented to secure and distribute printed copies.

Judge Holds And/Or Not the English Language

IN his opinion in the case of Tarjan vs. National Surety Co. Mr. Justice O'Connor of the Illinois Appellate Court declares that the symbol And/Or is not to be regarded as the "English language," as the words are used in the schedule of the Illinois Constitution of 1870. His exact words are:

"Moreover, an examination of the record shows that some of the findings of fact and propositions of law submitted were not in the English language and therefore cannot be considered, because section 18 of the schedule of the Constitution of 1870 provides that judicial proceedings shall be conducted and preserved in the English language. *Carlin v. Miller's Motor Corp.*, 265 Ill. App. 353. The second and third findings of fact and the third, fourth, fifth and sixth propositions of law submitted contained the symbol "and/or" eight times. We condemned the use of this freakish fad in *Preble v. Architectural Iron Workers' Union*, 260 Ill. App. 435. That we are right in our conclusion in this respect is seen by reference to the July, August, and September numbers of the AMERICAN BAR ASSOCIATION JOURNAL, pp. 456, 524 and 574 respectively."

In support of his view of the expression Justice O'Connor quotes at length from an editorial in the AMERICAN BAR ASSOCIATION JOURNAL of July, 1932, condemning the use of this "accuracy-destroying symbol" and also gives copious extracts from the symposium on the same subject in the September issue of the same year, in which Hon. John W. Davis, Hon. George W. Wickersham, Mr. Frederick A. Scott, Statute Revision Commission of Connecticut, and Mr. Clarence D. Meyer, Supreme Court Commissioner of New Jersey, joined in the attack.

The case was decided on other grounds, but the Court seized the opportunity of again putting on record its warning to the Bar against the use of an expression which is provocative of carelessness in lawyers and confusion in legal documents.

Massachusetts Judicial Council Grapples with Court Congestion Problems

IN the eighth annual report filed with the Governor today, the Massachusetts Judicial Council presents a number of money-saving and time-saving suggestions for the consideration of those interested in the tax-rate, the motor-vehicle insurance rate and the more prompt administration of justice, both in the civil and criminal courts. Following is a summary of the report, prepared for the press by F. W. Grinnell, Secretary of the Council.

The Council begins by pointing out that the annual net public cost of the court system is over six million dollars and that the cost for jurors alone at six dollars a day is almost seven hundred thousand dollars. It presents by the figures a really shocking picture of congestion and delay in the Superior Court, mainly in the jury-trial lists of the busier counties in which parties are obliged to wait from two to almost four years for trial because there were about 50,000 civil jury cases (mainly motor vehicle cases) "awaiting trial" on June 30, 1932.

This congestion is pictured, not as the fault of the judges, but as the result of the operation of the machinery. And the congestion is increasing by the entry of almost 30,000 new jury cases every year. With its other business, the court can try only about 2,500 jury cases a year. The public cost of jury trial, including "overhead," is estimated at about $500 a day. It is sometimes figured at $1 a minute, but it appears to be more than that. Most of these jury cases are motor vehicle cases.

The Council says the situation is bad, unjust and is growing worse. "What is to be done about it?" Increasing the number of judges would not solve the problem because that would not only increase the public cost, but if the number of judges were doubled, it would take them about ten years to dispose of the present accumulation without regard to the annual increase. The fact becoming more and more obvious is that the social need of compulsory motor vehicle insurance and the cumbersome, costly procedure of jury trial do not fit together. The administration of justice is a great business; the community and the legal profession need to develop some more prompt and less costly method of doing business.

Without in any way suggesting a change in the constitutional right to jury trial, the Council suggests that lawyers and plaintiffs habitually overestimate the importance to themselves of claiming jury trial. It points out that a study of all jury cases tried during two years showed no recovery at all in half of the cases and relatively small verdicts in most cases in which there was a recovery. It believes experience shows that the important thing for most parties and their lawyers is a prompt hearing of some kind rather than a delayed jury trial.

A trial before a judge without a jury, either in the district courts or in the Superior Court, can be had for the asking much more quickly and at much less cost to every one. The Council suggests various plans to induce lawyers and their clients to waive jury trial and get ahead faster.

The Council does not believe in transferring the business to a commission, or fixing arbitrary

limited rates of compensation for motor vehicle injuries (as in industrial accidents), a plan which is strongly advocated by many. This plan is discussed at length. The figures show that the number of fatal and other accidental domestic and other non-industrial injuries far outnumbers the motor vehicle accidents on the highways. While such accidents do not attract attention because they are less public and dramatic than motor vehicle accidents, the victims are just as dead or disabled as the motor-vehicle victims. The Council sees no reason for socializing motor vehicle losses by imposing on the community the great and uncertain cost of liability without fault while other non-industrial injuries are not so treated. The Council believes in keeping judicial business in the courts and adjusting court machinery to the changing needs of the community. The Council recommends an increased entry fee in the Superior Court and increased opportunities for jury-waived hearings. A majority recommends also a jury fee.

As the most effective method of reducing congestion, the Judicial Council points out that injured persons have no constitutional right to insurance protection. They receive that merely by statute, and the Council suggests that the legislature, on behalf of the public which pays the bills, may reasonably require injured persons to choose the less expensive method of trial as a condition of the right to reach the liability insurance to cover their claims. It is also suggested that parties should be allowed to bring suit in any district court within a county.

It suggests removing the "criminal record" from petty motor vehicle offenses.

Without suggesting the abolition of the grand jury, it advises procedure by which defendants may waive grand jury proceedings to avoid delay and expense.

To avoid abuse of the attachment laws, it suggests that wages shall not be attached by trustee process without leave of court and that a fee of two dollars (like a witness fee) be paid whenever a trustee writ is served.

It recommends a method of stopping the imitation of court process for the purpose of terrorizing unfortunate, but honest, debtors.

It recommends a provision for summary review of sentences in the Boston Municipal Court to avoid great expense and delay in the administration of the criminal law.

It recommends abolishing the notice of appointment of executors and administrators as a useless proceeding today.

Various other matters are reported on, at the request of the legislature, and the report ends with the usual careful summary and analysis of the work of all the courts of the Commonwealth.

Congressional Power and Conventions in the States

IN an address on "Amending the Constitution," delivered on Sept. 17 over the radio under the auspices of the American Bar Association, U. S. Attorney General William D. Mitchell touched on the question "whether Congress has power to interfere with the details, by prescribing the time of election, the election districts, the number of delegates, or the dates of holding the conventions" called to act on proposed constitutional amendments. He said:

"Notwithstanding some contention to the contrary, my impression is that the Congress must stop short with prescribing the general mode of ratification whether by legislatures or by representative conventions, and if the convention method is selected, it must be left to the state legislatures to prescribe all the details for the election of convention delegates, the only restriction on the states being that the conventions shall be fairly representative. A fair expression of the will of the people of the states acting through delegates elected by them to their state conventions is all that is required and there is no reason why the Congress should attempt to force upon any state, any particular time, place or method for electing their delegates or holding their conventions."

But now comes a former Attorney-General Hon. A. Mitchell Palmer, who maintains in an elaborate brief that Congress can not only do all the things which Mr. Mitchell doesn't think it has the power to do, but can even call the conventions themselves and require them to act promptly on the proposed amendments submitted. He advocates this course as the best and quickest way of securing action on an amendment for the repeal of the Eighteenth Amendment, and of thus making available to the government the large income which is expected to follow a change in the methods of dealing with the liquor problem.

This brief, which is obviously addressed to Congress and to the public alike, states that "it seems to be generally assumed that it will take years to adopt any proposed amendment to the Constitution. This arises from the fact that ratification of amendments heretofore has frequently been long delayed, because legislatures have been slow to act; and ratification by State legislatures has been the method uniformly employed. But the proper use of the power to submit to Conventions in the States, heretofore untried, will insure an early decision.

"The Congress enjoys the power to submit the proposed repeal amendment to Conventions in the States called and held in pursuance of Congressional action and to require the vote of such Conventions to be cast within any reasonable time, say, four months after the Congress adopts the necessary resolution, thereby making available—assuming the repeal amendment is ratified—these enormous revenues for the fiscal year beginning July 1, 1933. Such action, while uprecedented, would be plainly Constitutional and responsive to the present national emergency. To the manner and means by which the Congress may effectuate these ends, this memorandum is devoted."

Then follows a discussion of the power of Congress to do this. He points out that the Constitution was established by the people acting as sovereigns of the whole country and that it is not a contract of treaty between the States; that the States, as such, possess no general or implied power with reference to amendments to the Constitution; and on this latter point he says: "Clearly the States have no such power unless it was delegated to them by the Constitution itself, and no such delegation

is found therein. The Constitution in Article V provides the exlusive method of amendment. The fact that the legislatures of the States are named therein as the recipients of certain power is not inconsistent with the view just expressed, because the legislatures when acting under the Fifth Article, act as the delegated agents of the people and not in their ordinary capacity as branches of the Government of the States. The powers conferred upon the Congress and the legislatures by Article V are national political powers entirely outside the scope of the general legislative, executive and judicial power conferred upon the United States and the similar powers reserved to the States. This has been established by decisions of the Supreme Court of the United States."

After quoting from *Hollingsworth v. Virginia,* 3 Dallas, 378; *Hawke v. Smith,* 253 U. S. 221; *Leser v. Garnett,* 258 U. S. 130; and *U. S. v. Sprague,* 282 U. S. 716, 733-734, in support of this view, he continues:

"The view of the Supreme Court that the Fifth Article does not delegate any governmental power to the United States applies with equal force to the States and their legislatures. In selecting the legislatures as the recipients of certain powers, with respect to amendment of the Constitution, the people merely adopted convenient existing agencies of government as their agents for the exercise of a particular political power.

"From the foregoing, it must be concluded that the Fifth Article does not contemplate that the States, acting in their sovereign capacities, shall have any influence or control over ratification. It contemplates only the expression of approval or disapproval by the people acting through representative assemblages, either the legislatures or Conventions. No other power with respect to amendments was granted to the legislatures. As already seen, they have no general power of regulation over the process of ratification. If the Congress selects the Convention mode, such Conventions have identically the same power as the legislatures would enjoy had they been chosen. District Judge William Clark, in his exhaustive opinion in *U. S. v. Sprague,* 44 Fed. (2d) 967, 975, aptly states that legislatures act as the general agents of the people and the Conventions act as their special agents.

"These decisions also demonstrate that ratification, whether by legislature or by Convention, is not a State act; further, that the ratifying body does not act as an agent of the States, since if it did, the right of the State to command or forbid action by that agent under particular circumstances, could not be doubted. If the question whether a particular proposed amendment should or should not be ratified were a question for the State to decide, no one could deny its power to control that decision. The Supreme Court, in determining that ratification is beyond State control, has determined that the question is not for the State, but for the people in the State.

"This determination necessarily includes a decision that the State, as such, has nothing to do with the process of ratification, since that process is held to be a Federal function and therefore one over which the State government cannot in the nature of things have any power. If so, the State can not act in creating or maintaining the Convention or in determining how it shall operate. This leaves an inevitable dilemma—either the Congress has the necessary power or no one has it. That section of the people of the United States who happen to reside in a particular State have, as such, no organization. The Constitution nevertheless empowers the Congress to call upon them to act by a Convention. They cannot act unless some authority determines how the Convention shall be chosen and shall operate. The State cannot make this determination without exercising the control which the Supreme Court has determined it could not exercise. The Congress can make the necessary regulations as a normal part of its task of procuring the decision of the question of ratification by Convention. As a necessary part of the performance of this Federal function it can regulate and pay for the organization of the agencies which no other governmental body has power to set up.

"Aside from the pertinent decisions, it seems clear upon principle, that State legislatures should have no power or control over the Conventions. The Congress has the unrestricted choice of two modes of ratification. The Convention method is not a mere modification of the mode of ratification by legislatures. The two modes are entirely separate and distinct from each other. The selection of one is the rejection of the other. If the legislatures enjoy the power to prescribe the qualifications of the Convention delegates, to supervise their selection and action in assembly, it necessarily follows that the legislatures could defeat the Congressional reference to Conventions through declining to act or by imposing conditions upon such Conventions or their delegates as would reflect the views of the legislatures themselves. Such a theory would make the legislatures superior to the Constitution."

Hon. James M. Beck delivered an address in reply to Mr. Palmer's brief in the House of Representatives on Dec. 7, and Mr. Palmer rejoined with a "Supplemental Brief" a little later.

Chicago Meeting of the Association of American Law Schools

THE thirtieth annual meeting of the Association of American Law Schools was held at the Stevens Hotel in Chicago, December 28, 29 and 30, 1932. More than three hundred persons representing the Association's member schools were present, and one of the most satisfactory sessions in the organization's history took place.

The program consisted of three general meetings, thirteen Round Table conferences and the annual dinner, which was held upon the evening of December 29. In addition to these events a reception was tendered the Association delegates by the officers and members of the Executive Committee of the American Bar Association at the headquarters of the latter organization at 1140 North Dearborn street.

The meeting began Wednesday morning at 10:30 with the President's address, "Social Planning and Perspective Through Law," delivered by Dean Albert J. Harno, of the University of Illinois College of Law. This was followed by the report of

the Executive Committee and that of the Treasurer, and the session closed after a brief business session.

The second session, which took place on the afternoon of the same day, consisted of a symposium, "Cooperative Efforts to Raise the Standards of the Legal Profession." Three addresses were delivered at this time with titles as follows: "What the Law Schools Can Do to Raise the Standards of the Legal Profession," by Elliott E. Cheatham, of the Law School of Columbia University; "What a Bar Association Is Doing to Raise the Standards of the Legal Profession," by R. Allan Stephens, Secretary of the Illinois State Bar Association; and "Law Schools, Bar Examiners and Bar Associations: Co-operation vs. Insulation," by Philip J. Wickser, Secretary of the New York Board of Law Examiners and Member of the Executive Committee of the National Conference of Bar Examiners. The discussion of symposium papers was opened by members of the Association's Committee on Co-operation with Bench and Bar.

The final general session was held on the afternoon of Friday, the closing day of the Association meeting. The topic under consideration was "The Value and Use of American Law Institute Restatements in the Teaching of Law." A paper bearing this title was read by William Draper Lewis, Director of the American Law Institute, and the discussion was led by Henry L. McClintock, of the University of Minnesota Law School, and Ira P. Hildebrand, of the Law School of the University of Texas. This portion of the session's program was followed by reports of Association committees, and the thirtieth meeting closed after a further business session.

Speakers at the Association's annual dinner, which took place Thursday evening at the Stevens Hotel, were Charles P. Megan, President of the Chicago Bar Association, and Frank J. Loesch, of the Chicago Bar, Member of the National Committee on Law Observance and Enforcement, and President of the Chicago Crime Commission. Mr. Megan delivered an address of welcome to Association delegates on behalf of the Chicago Bar, and Mr. Loesch spoke on the subject, "Recent Attempts to Defeat Organized Lawlessness in Chicago." Dean Albert J. Harno, President of the Association of American Law Schools, acted as Toastmaster.

Round Table Conferences took place during the evening of December 28, the morning and afternoon of December 29, and the morning of December 30. At these times the following Round Tables presented programs: Law School Objectives and Methods, Library Problems, Property and Status, Commercial Law, Equity, Public Law, Business Associations, Jursiprudence and Legal History, Legal Aid Clinics, Wrongs, Comparative Law, Legislation, and Remedies.

The following officers were elected for 1933: President, Charles E. Clark, Yale University; Secretary-Treasurer, Rufus C. Harris, Tulane University; Members of the Executive Committee, Henry Rottschaefer, University of Minnesota; Albert J. Harno, University of Illinois, and Merton L. Ferson, University of Cincinnati.

THE JURISDICTION OF THE FEDERAL COURTS IN CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES

As Matters Now Stand, the Most Elementary Considerations Affecting This Branch of Federal Jurisdiction Are Unproved — Discussion Thus Far Has Been a Confusion of Diametrically Opposed Theories Urged by Confirmed Conviction and Illustrated by Scattered Information — Review of Chief Counts in the Case of Federal Diversity Jurisdiction, as Reported Primarily in Hearings at Last Session of Congress.

By Hessel E. Yntema
Institute of Law of The Johns Hopkins University

IN the last session of Congress, three bills were introduced, each of them seeking a more or less extensive readjustment of the jurisdiction of the federal district courts in controversies between citizens of different states. The most radical of these proposals, the Norris bill,[1] as it is commonly known, would simply have abolished this branch of the federal jurisdiction by omitting from the Judicial Code[2] the clause vesting in the district courts jurisdiction in suits between citizens of different states. A second bill, introduced by Representative Bulwinkle, contemplated that in such suits the amount in controversy should exceed $7,500, exclusive of interest and costs,[3] instead of $3,000, the jurisdictional minimum established in 1911.[4] The purpose of a third proposed amendment of the Judicial Code, sponsored by Attorney-General Mitchell, was "to make corporations, for jurisdiction of the United States courts, citizens of a State where they carry on business, in all litigation between them and citizens of such State arising out of such business."[5] This last suggestion, which was apparently intended as a compromise to avoid more drastic limitation of the diverse-citizenship jurisdiction, was a novel departure, whereas the Norris and Bulwinkle bills had been anticipated by similar proposals in the 70th and 71st Congresses.[6]

Whether regarded from a theoretical or a practical point of view, the bills referred to involve substantial problems as to the propriety of the federal jurisdiction in controversies between citizens of different states. Theoretically, a fundamental question as to the distribution of ordinary civil litigation between the state and federal courts is raised, namely, in what measure the burden of such litigation is to be carried and its development influenced by the federal judiciary. The central practical issue at stake is whether business controversies, typically springing from the activities of non-resident corporations under the present economic regime, if not defined as arising out of interstate commerce or otherwise covered by federal law, shall be cognizable in the federal as well as the state courts. In other words, the proper function of a federal judiciary in respect of civil, and more especially commercial, law is in question and, ultimately, the relation of government to corporate business.

Measured by ordinary legislative standards, the consideration given to the matter in the last session of Congress was typical but not unworthy. Hearings were held by the judiciary committees of both Senate[7] and House,[8] at which the views of the Attorney-General, of representatives of the American Bar Association, and of various organizations representing insurance, surety company, industrial, and banking interests, were presented. In addition, a special report was submitted by Senator Norris[9] and communications from interested legal scholars published.[10] The discussion was sufficiently comprehensive to bring the many facets of the problem to the attention of the two judiciary committees, yet it was inconclusive. It cannot be said either to have elicited an incisive or comprehensive analysis of the function of a federal judiciary in civil litigation or to have responded effectively to the principal question whether it is in the public interest that interstate business not defined as "interstate commerce," should, as such, have access in the first instance to the federal courts.

That this is so must be attributed, not to lack of interest, but to certain inherent difficulties in the democratic legislative process. With uninformed popular opinion as the ultimate arbiter, it were diffi-

1. S. 939. H. R. 11508. (LaGuardia). 72nd Congress. First Session.
2. U. S. C. title 28, sec. 41, par. (1).
3. H. R. 4536. (Bulwinkle). 72nd Congress. First Session.
4. 36 Stat. 1091. The minimum set by the First Judiciary Act was $500. 1 Stat. 79, which was raised to $2,000 by the Act of 1887-1888. 25 Stat. 434.
5. S. 937. H. R. 10594. 72nd Congress. First Session. See op. cit. infra, note 7, p. 7.
6. A fourth bill to deprive the district courts of jurisdiction to enjoin any order of a state administrative board or commission, which was introduced by Senator Johnson, should be mentioned. (S. 3243. 72nd Congress, First Session). Since, however, it does not relate primarily to the diverse-citizenship jurisdiction, it is only incidentally involved in this discussion.
7. Limiting Jurisdiction of Federal Courts. Hearings before a subcommittee of the Committee on the Judiciary. United States Senate. Seventy-second Congress. First Session. On S. 937, S. 939, and S. 3243. March 18 and 19, 1932. Washington, 1932. p. 189.
8. Limiting Jurisdiction of Federal Courts. Hearing before the Committee on the Judiciary. House of Representatives. Seventy-second Congress. First Session. On H. R. 10594, H. R. 4536, and H. R. 11508, May 4, 1932. Serial 12. Washington, 1932. p. 104.
9. Limiting the Jurisdiction of District Courts of the United States. Senate Report No. 530. 72nd Congress, 1st Session. Much of this report is quoted in a later report by Senator Norris, Jurisdiction of the District Courts of the United States over Suits of State Administrative Boards. Senate Report No. 701. 72nd Congress, 1st Session.
10. E. g., from Charles Warren and Professor Felix Frankfurter, op. cit. supra, note 8, at 97 and 100, and from Dean Charles E. Clark, op. cit. supra, note 7, at 86.

cult at best to maintain the discussion of so complicated and so technical a problem as that presented by the diverse-citizenship jurisdiction, upon a high, objective plane. It is doubtless inevitable in legislation, that many measures should be put forward to realize peculiar political theories or special interests and that they should be opposed upon the same controversial level. It seems equally unavoidable under present conditions, that legislation, advocated by reformers seeking palliatives for situations about which there is public outcry, should seem to be hasty and experimental and too often not predicated upon the sound judgment which can only arise after a careful study of its probable practical effects. In the absence of such a study of the federal diverse-citizenship jurisdiction, the need for and requirements of which have been indicated elsewhere,[11] it was inevitable that the discussion of the matter in Congress should be inconclusive. As we shall see, even the bearing of the proposed legislation upon the problem of congestion in the federal courts has been misapprehended. From an outside point of view, the discussion therefore resembles a three-cornered controversy of opinions, largely hypothetical and more or less rigidly asserted, among those who maintained that the diverse-citizenship jurisdiction was quite bad, those who regarded it as an essential, constitutional benefice, and an *amicus curiae* who advocated a politic compromise.

If the discussion of legislative proposals becomes thus litigious, those who participate may reasonably be asked to indicate their point of view. It may be suggested that to every proper litigation there are at least three parties,—a plaintiff, a defendant, and an arbitrator to whom the issues are submitted for judicious review. To render such an objective review of the problem feasible, there is requisite a detailed, comprehensive, and critical determination of the facts concerning the federal jurisdiction in controversies between citizens of different states. As matters now stand, the most elementary considerations affecting this branch of the federal jurisdiction are unproved, viz.—whether there is at present in particular sections of the country a problem of local prejudice against non-residents; whether the adjudication of ordinary civil cases in the federal courts has tended towards national uniformity in the development of law; whether the operation of the federal diverse-citizenship jurisdiction is at present attended by serious abuses or is unduly costly to the litigant; whether the jurisdiction, as at present defined, imposes an undue burden upon the federal courts; whether, in fine, the commerce and industry of the country would be affected, and, if so, in what degree, by changes in the jurisdiction so drastic as those proposed in the recent session of Congress. Consequently, for want of objective, detailed proof of such basic issues as these, the discussion of the problem has thus far been a confusion of diametrically opposed theories, urged by confirmed convictions and only in part in some instances illustrated by scattered information. What is not known, is generally assumed. In more explicit terms, any legislation on the subject for the time being will be highly experimental and, at best, predicated upon a theoretical guess as to what the consequences may be. Perforce, under such circumstances, the issues cannot be settled by a mere critical examination without extensive investigation of the facts, but, as will appear from the following, the pleadings can be measurably improved. The belief that some such analysis is a necessary preliminary to an adequate consideration of the problem is the motive of the present discussion.

Whether in so controversial a matter and without a sufficient representative basis of fact by which theory can be tested, the position of detached criticism will be tenable without invoking the ungrateful consequences of neutrality, is perhaps a question. To be useful, such criticism must chiefly concern itself with the probable fallacies and limitations of the theories adduced on each side. However, one possible objection to the disinterested consideration of current legislative problems may be disposed of beforehand, namely, that such criticism tends to paralyze action and therefore to have the effect of reinforcing the *status quo*. To this there are two good and sufficient answers: first, that there is no reason to suppose that to increase the flood of ill-considered legislation is better than to decrease it; second, that whether or not such will be the effect depends not upon the criticism but upon the theory of the *status quo*, i.e., whether Tory or Progressive, according as it is presumed that the *status quo* is ancient and therefore good, or that the *status quo* is ancient and therefore bad. Irrespective of which theory is adopted, the scientific problem remains.

With this justification, we proceed to review the chief counts in the case of the federal diversity jurisdiction, as reported primarily in the hearings had in the last session of Congress. It will be convenient to consider first the theoretical arguments for and against the continuance of this jurisdiction and, second, to canvass the practical considerations urged, among which the relation between the diversity jurisdiction and congestion in the federal courts has accidentally assumed such importance as to warrant separate treatment. From this practical point of view it will also be desirable to examine the brief submitted by the *amicus curiae* and to summarize the possible methods of dealing with the situation. The present article is concerned with the general theories.

II

The theoretical arguments for the substantial limitation or abolition of the federal diverse-citizenship jurisdiction, have taken various forms. The chief points are: that the jurisdiction requires the federal courts to adjudicate state cases; that it involves discrimination and injustice; that it makes property rights more valuable than human rights; that it is hostile to the reign of law. These arguments may be considered in order.

The first argument, to the effect that the federal diverse-citizenship jurisdiction is a constitutional anomaly, since it requires the federal judiciary to take cognizance of state cases, rests upon a partial analysis of the federal judicial power as defined in the Constitution. In the first place, Article III, Section 2, of the Constitution includes within the judicial power of the United States cases of at least three types: those defined by reference to the *law* by which they are to be governed, (cases

11. H. E. Yntema and G. H. Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U. of Pa. Law Review, 869 *et seq.* (May, 1931.)

under the Constitution, federal laws, or treaties); those defined by reference to *subject-matter*, (admiralty and maritime cases); those defined by reference to the *citizenship* of the parties, (cases to which the United States, or public ministers are parties or involve controversies between a State and/or its citizens and another State and/or its citizens, etc.). In the second place, if the argument were consistently maintained, it should conversely preclude the trial of cases involving the application of federal law in the state courts, e.g., under the federal employers' liability act, which would be highly inconvenient and inconsistent with the provision in Article VI of the Constitution that the Constitution and the laws and treaties made under its authority shall be the supreme law of the land.

Furthermore, the only conclusion which can be drawn from the history of the constitutional convention is that the various branches of the federal judicial power were, each of them, included on highly practical grounds; they were intended to assure to the federal government, the respective states, and the individual citizens thereof the powers, privileges, and immunities defined by the Constitution. The experience of the Confederation had shown that mere constitutional definition of rights, enforced by a league of states, was inadequate; and that a federal government, with an appropriate judicial power, operating directly upon individuals as well as States, was required.[12] These circumstances must be taken into account in any sufficient definition of federal litigation. The argument that the presence of a question of federal law alone is a proper test, begs the question.

The second argument is that the federal jurisdiction between citizens of different states is discriminatory; the non-resident, it is alleged, enjoys "a privilege in a State which is denied to every corporation and every citizen of that State."[13] There is a partial basis for this argument. Under the present removal law, a situation exists, which, in theory at least, discriminates against the resident defendant. A non-resident, sued in a state court by a resident, may remove to the federal court; a resident, sued in the same forum by a non-resident, or a plaintiff, whether resident or non-resident, cannot. The result is that a non-resident, whether plaintiff or defendant, is enabled to elect the forum, except when he is originally sued by a resident plaintiff in the federal court.[14] The justification for the rule that suits are removable at the instance only of a defendant, not resident in or, alternatively, not a citizen of, the state in the courts of which action is brought, must be found in the notion that a plaintiff cannot reasonably object to a forum he has chosen nor a defendant to the court of his residence or citizenship. The idea that a resident defendant is unlikely to be prejudiced by local influence, is perhaps also involved. To the extent that the avoidance of local prejudice is the purpose, therefore, it does not appear unreasonable to restrict the power of removal to the non-resident. There are, however, other considerations. A difference in the law applied, in the character of the judge or jury, in the power of the court to control evidence, for instance, may place the non-resident at a definite advantage, if he alone has the power to remove his case from the state to the federal court. It does not, however, necessarily follow that, to secure equality as between defendants, the removal of cases from state to federal courts should be abolished; as Judge Parker has remarked, one remedy for such discrimination against the resident is "not to destroy an important jurisdiction of the federal court, but to amend the removal statute so as to give him the right to remove if he desires."[15] In any event, the argument, while suggesting a possible amendment of the removal law, does not expose an inherent theoretical difficulty in the federal jurisdiction based upon diversity of citizenship. No such discrimination is made as between parties plaintiff nor need such be made between defendants for the purposes of removal.

A third argument is the interesting but unique contribution of Senator Norris. It is that "under existing law the non-resident is given an unfair advantage for his property, an advantage which does not accrue in favor of his personal liberty. His property rights, in other words, are given more consideration and are surrounded with more safeguards than are the rights of life itself."[16] What is in mind is that the federal jurisdiction over controversies between a state and citizens of another state has not been extended to criminal prosecutions under state laws as the diverse-citizenship jurisdiction has been to the analogous civil suits.

This argument tends to defeat itself. It is like throwing away your hat, because you have not had a square meal. If the analogy between civil and criminal jurisdiction, which is suggested, may be taken to assume the possibility of local prejudice or other valid reason for federal jurisdiction in criminal as well as in civil litigation involving non-resident defendants, it argues for appropriate provision for removal to the federal courts in criminal as well as civil proceedings, rather than the total elimination of the federal jurisdiction. Apart from this, there may be questions, mainly derived from historical considerations, as to the usefulness of stressing an analogy between civil and criminal proceedings from the point of view of removability from state to federal courts. To speak precisely, state criminal prosecutions of non-residents are not cases "between citizens of different states," under the decisions of the Supreme Court that a State

12. E. g., The Federalist, Nos. XX, XXI, LXXX; 5 Hunt, Writings of James Madison, (1904), 17, 19 *et seq.*

13. Op. cit. supra, note 9, p. 6.

14. The chief provisions which have been made in the various judiciary acts as to the party entitled to remove a controversy to the federal court in cases involving diversity of citizenship may be summarized as follows: Under the First Judiciary Act, an action in any state court against an alien or by a citizen of the state in which suit was brought against a citizen of another state, involving more than $500, was removable to the federal court at the instance of such defendant. 1 Stat. 79. By the Act of March 2, 1867, c. 196, 14 Stat. 558, a citizen of another state than that in which suit was brought, whether plaintiff or defendant, was enabled to remove a suit pending in the state court to the federal court upon affidavit of prejudice or local influence. The provision in the Judiciary Act of 1875 was still more liberal; it provided for removal of suits between citizens of different states or between citizens of a state and foreign states, citizens, or subjects, at the instance of either party. 18 Stat. 470. The present provision in section 71 of the Judicial Code was in substance introduced by the Judiciary Act of 1887-1888, 25 Stat. 434, and enables any suit of a civil nature, pending in a state court, other than suits arising under the Constitution, federal laws or treaties, which can be removed by a defendant therein, to be removed to the federal court "by the defendant or defendants therein, being non-residents of the State," if the federal court has jurisdiction thereof; furthermore, upon a showing of prejudice or local influence, any defendant, being a citizen of another state than that in the courts of which action is brought by a citizen thereof, can remove the case to the federal court, 25 Stat. 434.

It will be noted that, under the above provisions, distinction has variously been drawn, (a) according to the character of the party as plaintiff or defendant, (b) according to citizenship, (c) according to residence, (d) according to a showing of local prejudice.

15. J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It. 18 American Bar Ass'n. Journal, 433, 438. (July, 1932.)

16. Op. cit. supra, note 9, p. 7.

is not a citizen for the purposes of this clause.[17] Also, the theory of jurisdiction in civil cases contrasts with that in criminal; many civil actions are transitory, while criminal proceedings are not, not only because they are prosecuted by the state but, also, because, under Anglo-American conceptions, the competent forum is with few exceptions that of the *locus criminis*. Thus, in Article III, Section 2 of the Constitution, it is prescribed that the trial of all crimes "shall be held in the State where the said crimes shall have been committed," and in Article IV, Section 2, provision is made for the extradition of any person charged with crime to "the State having jurisdiction of the crime."

It is an independent question whether an enactment authorizing the removal of state prosecutions to the federal courts upon application by accused non-residents would be feasible or desirable. Literally, it is true that such prosecutions may be defined as "controversies . . . between a State and citizens of another State," but the few early dicta on the point would seem to preclude this construction.[18] Consequently, the formal difficulties in such an extension of the federal jurisdiction would seem to be: first, that it would involve an unwarranted intervention in the exercise by the state of its police power, perhaps on the theory unsuccessfully urged by Mr. Justice Clifford in Tennessee v. Davis,[19] namely that the federal district courts have no criminal jurisdiction unless the offense is defined by act of Congress and is cognizable under the authority of the United States; second, that statutory provision for the removal of state criminal prosecutions at the instance of accused non-residents would contravene the spirit if not the letter of the Eleventh Amendment. It may be that such an enactment, for which there seems to be no precedent, would be desirable, but the possibility clearly should be considered on its own facts and does not throw any significant light upon the present discussion.

A fourth theoretical argument against the federal jurisdiction founded upon diversity of citizenship is that it is hostile to the reign of law, because it involves duplication of jurisdictions and, under the doctrine of *Swift v. Tyson*,[20] duplication of law. That this argument postulates the desirability of a utopian simplicity in the federal judicial structure will be apparent, when the expediency of empowering the state courts to exercise a jurisdiction concurrent with that of the federal courts in many questions arising under the Constitution and the federal law is considered or it is recalled that, in commercial cases at least, the principle of the transitory character of the more ordinary types of actions and consequent duplication of possible jurisdictions has long since become a highly useful and integral basis of the rules as to venue. Furthermore, the point is purely theoretical; it is not shown in what sense the principle of exclusivity as between federal and state jurisdictions is workable, or whether it is expedient.

Equally theoretical is the aspect of the argument directed against the federal common law, the doctrine under which the federal courts have assumed the function of interpreting the general common law according to their own precedents and conceptions of justice in preference to the decisions of any particular state. This is so, despite the fact that it has fairly been shown that this interpretation of the conformity clause in the First Judiciary Act was not contemplated at the time of its enactment.[21] The occasional result, namely, that of conflicting lines of decision, state and federal, is of course not astonishing, as similar phenomena have occurred with sufficient frequency in the development of doctrine in the state decisions themselves, even of a single appellate court and more frequently when there are several intermediate courts of appeal, to suggest that such occurrences are inevitable temporary concomitants of the growth of a system of precedents in response to new legal problems. The explicit recognition of the possibility of divergent views on questions of general law in the state and federal courts expressed in *Swift v. Tyson*, therefore, will necessarily offend only that type of rigorous legalism which idealizes law as a stationary logical unity and not as an evolutionary response to social conditions.

What is especially to be noted, however, is the fact that this argument envisages the problem of uniformity in law upon a local rather than a national scale. As has been suggested by John Bassett Moore,

> "There are subjects in respect of which, in spite of the fact that national legislation does not deal with them, the general convenience calls loudly for uniformity. This is particularly the case in regard to the law relating to commercial matters. For this reason I confess I have always considered the conception of the Supreme Court of the United States in Swift v. Tyson as essentially sound. . . .
>
> "We may find in the decisions of the Supreme Court a response to the desire which has manifested itself in all times and in all lands, and which has in so many countries led to the establishment, in one way or another, of a uniform civil and commercial law."[22]

In theory, therefore, the argument is defective, first, because it does not endeavor to distinguish local from national legal problems and, second, because it is not supported by any showing that the doctrine of *Swift v. Tyson*, even if it be the result of a common error, has not played an essential part in securing national uniformity of law.[23] That such uniformity is regarded as desirable, at least in the more important fields of civil law, is attested by the

17. E. g., Stone v. South Carolina, 117 U. S. 430. (1886.)

18. See J. C. Rose, Jurisdiction and Procedure of the Federal Courts, Albany, 1922. 53, 54. The remarks of Iredell, J., in *Chisholm v. Georgia*, 2 Dall. 419, 431, (1792), are as follows:

"The constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, (in Article III, Sec. 2), but in respect to the subject-matter upon which such jurisdiction is to be exercised, uses the word "controversies" only. The act of Congress more particularly mentions civil controversies, a qualification of the general word in the constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word, "controversies," was intended to include any proceedings that relate to criminal cases, which in all instances that respect the same government, only, are uniformly considered of a local nature, and to be decided by its particular laws. The word "controversy" indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in Congress to guard against the possibility of it."

See also the statement of Marshall, C. J., in Cohens v. Virginia, 6 Wheat 264, 399. (U. S., 1821):

"Of the last description, (cases in which an original suit might not be instituted in a federal court), is every case between a state and its citizens, and, perhaps, every case in which a state is enforcing its penal laws."

For cases suggesting analogies to the contrary, see Martin v. Hunter's Lessee, 1 Wheat. 305, 349 ff. (1816); Mayor, etc. v. Cooper, 73 U. S. 247, 251 ff. (1867); Tennessee v. Davis, 100 U. S. 257, 271. (1879); Gaines v. Fuentes, 92 U. S. 10, 18. (1875.)

19. 100 U. S. 257, 274. (1880.)

20. 16 Pet. 1. (U. S. 1842.)

21. Warren, New Light on the History of the Federal Judiciary Act of 1789, (1923). 37 Harv. Law Rev. 49.

22. International Law and Some Current Illusions, New York, 1924. pp. 233, 234.

23. For a discussion of a limited aspect of this problem, see note 23 in the article cited in note 11, supra, pp. 881-886, in which the effect of the decision in Swift v. Tyson upon the decisions in eight states is analyzed.

work of such institutions as the Commissioners on Uniform State Laws, the American Law Institute, and, not least, our great national schools of law.

The argument that duplication of state and federal jurisdictions in controversies between citizens of different states is inherently vicious, must therefore be rejected for want of sufficient analysis and default of detailed proof. It does, nevertheless, carry a germ of truth, in that it is motivated by an anomalous situation, which can be attributed neither to the federal diverse-citizenship jurisdiction as such nor to the doctrine of *Swift v. Tyson*. This situation, the recent and most horrible instance of which is afforded by the case of Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,[24] is that, under the fiction established as early as 1844,[25] whereby a corporation is deemed a citizen of the state in which it is incorporated, purely local businesses are permitted under the federal decisions to evade the law of the state in which they are actually located by incorporation in another state, insofar as the federal common law differs from that of the former state. The decisions which permit this result, indicate perhaps how strong is the tendency to regard certain aspects of the law of corporations as matters of federal concern, but they are not justifiable upon any theory which allocates to the individual states control over intra-state business. In view of the strong dissent in the Black & White Taxicab Co. case, it would not be surprising that the situation should be corrected eventually by the federal courts themselves; meanwhile, the decision is an appropriate occasion for legislation. What is to be noticed, however, is that the abuse of the presumption as to corporate citizenship is a most inadequate basis for the broad conclusion that the federal jurisdiction between citizens of different states, as well as the doctrine of *Swift v. Tyson*, must therefore be expunged. This would be like tearing down a house to get rid of a sparrows' nest under the eaves.

III

The theoretical arguments in favor of the maintenance of the federal diverse-citizenship jurisdiction, like the theories to the contrary which have just been considered, suffer from incomplete analysis of the problem and are in large part based upon general assumptions which have not been sufficiently verified. The chief considerations alleged are: first, that the federal jurisdiction between citizens of different states is and has been essential to the development of national commerce; second, that uniformity of decision throughout the United States in matters of general law will be destroyed by the abolition of the federal jurisdiction; third, that the jurisdiction is necessary to afford the non-resident an impartial and efficient tribunal; fourth, that the abolition of the federal jurisdiction would be unconstitutional.

The first argument, that the federal jurisdiction between citizens of different states is an essential condition of the national economy, like many conclusions drawn from the manifest destiny of historical developments, is scarcely susceptible of scientific proof or disproof, so long as the jurisdiction continues. It would indeed be almost impossible to demonstrate what the development should have been, had the jurisdiction not been employed. It may also be remarked that the argument, as such, is imperfect, in that it does not indicate the relative influence of the diverse-citizenship jurisdiction upon business conditions, as contrasted with that of other branches of the federal judicial power, such, for instance, as the legislation and decisions under the commerce clause. Even if the argument can be taken to describe the total effect of the federal judicial power in all its branches in assuring a basis for national commerce, it still remains to be shown that what is predicated of the whole applies to a part, and in what degree. Conceivably, specific relations between the federal diversity-citizenship jurisdiction and particular business activities may be suggested by a study of the facts; unfortunately, however, in the recent session of Congress no detailed evidence was presented from which inferences could reasonably be drawn as to the probable effect of the abolition of the federal jurisdiction upon particular businesses represented. Such evidence would tend to verify the argument but could scarcely prove it; a conclusive demonstration that the federal jurisdiction between citizens of different states is a necessary condition of national business, would seem to require the heroic experiment of its abolition. Thus, at the least, the argument is unproved and overstated.

A restatement of the argument to the effect that it is desirable, even if not essential, to have a national jurisdiction for national business, is theoretically more plausible, though it needs actual proof. So much, however, can scarcely be said of the efforts in rebuttal. These have taken the form, first, of an assertion that the migration of investments from East to West, one concomitant of national business, has been undesirable and, second, of pointing to the large investments in foreign bonds in spite of defaults as a basis for the prediction that interstate investments will continue, even if the non-resident investor is denied access to the federal trial courts. Implicitly, these positions confute each other; moreover, the first proposition is quite unsubstantiated, while the second will be seen, under a plausible generalization, to conceal a double weakness. In the first place, it sets the matter in an improper light; the problem is not whether the abolition of the federal jurisdiction in question will entail the disappearance of interstate investments or of all national commerce, but whether, assuming a national business structure as a desirable end, conditions favorable to its development will so be created. This is presumably a question of degree, as to which not even theoretical, much less specific, proof is suggested. In the second place, the argument seems to warrant the strange inference, that, because investors have placed their capital in foreign bonds without apparent serious regard to prospective legal protec-

24. 276 U. S. 518. (1928.)

25. Louisville, Cincinnati & Charleston R. R. Co. v. Letson, 2 Howard, 495. (U. S. 1844). See the opinion of C. J. Taney in Ohio & Mississippi R. R. Company v. Wheeler, 1 Black, 286, (U. S. 1861), at p. 296:

"The court in that case, (the Letson case), upon full consideration, decided, that where a Corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States."

tion, it is reasonable that non-resident investors in state and municipal bonds should not be protected by the federal courts against default!

The second argument, that uniformity in general law throughout the United States will disappear with the federal jurisdiction in controversies between citizens of different states, presents a consideration to which reference has above been made. Theoretically, the statement of the argument is overdrawn; however important the function of the federal courts may be in this regard, there are other educational institutions than the federal courts, which promote national uniformity of law. And, as has been stated, the argument wants specific historical demonstration of its plausibility.

The third and classic argument for the federal diverse-citizenship jurisdiction has been most precisely stated by Alexander Hamilton:

> "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union."[26]

That the possibility of local prejudice against non-residents and aliens and the inadequacy of the state courts were at least the ostensible grounds for the extension of the judicial power of the United States to controversies between citizens of different states or to which an alien was a party, has been generally accepted and indeed is indisputable in view of the evidence. Attempt has been made, however, to discount the evidence by a two-fold historical argument, namely, that "tepid" support was given to this branch of the judicial power of the union by leading federalists at the time of the adoption of the Constitution, and, more specifically, that there is no contemporary evidence of local prejudice sufficient to justify the assumption that the federal diverse-citizenship jurisdiction grew out of any serious defects of the confederacy or was an essential federal power even in 1787.[27] To this argument the presence of the diversity of citizenship clause in the Constitution is of itself a complete answer. Moreover, it is to be noted, first, that the argument over-emphasizes the element of local prejudice at the expense of slighting other substantial grounds for the disqualification of state courts as the exclusive federal tribunals of first instance and, second, that, as has been indicated in detail elsewhere, [28] the available evidence does not confirm this criticism of the classical theory.

In any case, the consideration of constitutional origins is inconclusive. Conditions change so as to obsolete old forms, or, not infrequently, they are validated by new uses. It has, therefore, been properly urged that what is now significant is the appropriateness of the federal diverse-citizenship jurisdiction to present conditions. From this point of view, two questions are immediately put in issue: whether the state courts are sufficiently impartial in actions involving citizens of other states to be given exclusive original jurisdiction thereof; whether their modes of procedure and the substantive law which they apply are sufficiently improved to satisfy the national requirements of justice in such instances. However, be it noted that, even if these questions could be answered in the affirmative, the need of the federal jurisdiction in such cases is not yet disproved. It may have acquired other uses, not originally contemplated, e.g., to ensure the uniform development of national law, which alone may warrant the continuance of the jurisdiction.

In view of the emphasis laid upon local prejudice as a basis for the federal diverse-citizenship jurisdiction in the classical theory, it is interesting that both advocates and critics of the jurisdiction have thought that the matter could be settled by quite broad generalizations, at times referred to individual experience at the bar. Such assertions would be relatively persuasive, if they agreed, but even the facts are disputed. One point of view is that no statistics are needed to show that a non-resident will secure a more impartial trial in a federal than a state court; another that the original reason for the jurisdiction, prejudice against citizens of other states, has long since passed away and that, if there is prejudice, it is directed against corporation or moneyed interests, irrespective of their technical residence. Between such opposed views, so generally advanced, it is not the purpose here to judge.

What may be noted, however, is, first, that the question of local prejudice refers to a condition and not a theory; second, that the question not only relates to the present existence of local prejudices but is also historical, i.e., it seeks a basis of prediction as to the probable recurrence of sectional prepossessions against non-residents and as to how sporadic such phenomena will be; third, that conditions may vary from section to section of the country, from state to state, and even within each state, as well as in respect of the objects of communal antipathy. The contrariety of opinions as to the present situation obviously can be settled only by an appropriate report upon the facts representing at least the various sections of the country. Scattered observations suggest that such a report would disclose past and present prepossessions in favor of local interests, against which the state courts and sometimes even the federal tribunals have not always protected the non-resident. However this may be, the problem involves a range of phenomena, too wide, historically and geographically speaking, and of too complex a character, to yield to the methods of ordinary shotgun statistics or to be foreclosed by some broad, theoretical presumption, even though it be based upon the discrete experience of an individual over a period of years. "Here," it has been properly pointed out, "is an issue of fact where the need of dispassionate ascertainment of the real situation and perhaps of some experimentation to test the results of slight modification of existing rules would seem apparent."[29]

The alternative basis for the federal jurisdiction between citizens of different states proposed by the classical theory, namely, the possible inadequacy of the state courts as federal tribunals, raises questions, even more delicate and difficult of solution than those relating to local prejudice and, in some respects, far more important. The question of course relates only to the concurrent jurisdiction

(*Continued on page* 119)

26. The Federalist, No. LXXXI. (1788.)
27. Friendly, The Historic Basis of Diversity Jurisdiction (1928). 41 Harv. Law Rev. 483.
28. Op. cit. supra note 11, at pp. 875-878, notes 12 and 13.
29. This is Dean Clark's suggestion. See op. cit. supra, note 7, at p. 36.

ENGLISH LAW REFORM AND THE NEW RULES OF PROCEDURE

British Criticism of Civil Justice Has Continued since Dickens' Day but with Shifting Emphasis — Predominance of Laymen in Law Reform Movements Typical of English Methods—New Rules Are Result of Investigation Begun by London Chamber of Commerce — High Cost of English Justice — Recommendations of General Council of Bar for Saving Time and Money Adopted in Principle by Rules Committee—One Helpful Suggestion for American Reformers

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IT is customary in this country to refer to English court procedure in an almost lyrical note. This is no doubt attributable to the remarkable contrast between the swiftness and sureness of English criminal justice and the delays and uncertainties to which we are accustomed. Unlike the Englishman himself, however, when we voice our envious approval, we do not discriminate between the criminal and the civil courts. When the Englishman speaks of "British justice" as working with almost the inevitableness of a natural law, from whose operation none is so highly placed as to be immune, he has in mind criminal justice; for he does not have the same unalloyed admiration for his civil courts.[1]

On the contrary, the attack begun by Dickens in "Bleak House" has never ceased. Only recently sandwich men, bearing placards derogatory to law and lawyers, have picketed the Royal Courts of Justice in the Strand.

It is true, however, that the emphasis of the criticism has shifted. Most of the delays and anomalies which Dickens castigated were eliminated by the Judicature Acts and subsequent legislation. Present day criticism is directed to the cost of civil justice. In the language of the London Chamber of Commerce, "it is as if a person who wished to buy a cheap car were told that he could only have a Rolls or Daimler. His answer would be that if it is a case of either Rolls or Daimler, or no car, then he must go without a car. He would at once admit that the Rolls or Daimler was the best of cars, but would say that he could not afford it. So with our present system of litigation."[2]

It was this investigation begun by the London Chamber of Commerce which resulted in the New Rules of Procedure. The committee of the chamber consisted of two accountants, a past president of the Chartered Institute of Secretaries, an insurance broker and two solicitors. This predominance of laymen in a movement looking to law reform is typical of English methods. The precedent seems to have been established in 1850 when Parliament objected to the fact that a commission appointed to investigate the Court of Chancery consisted exclusively of lawyers.

Of the eleven members of the important Royal Commission of 1913, chosen to investigate delays in the king's bench division, three were lawyers. The critics of the commission's report used even this minority representation of the profession as a basis for their attack, on the theory that, in connection with law and procedure, lawyers, as parties in interest, should be merely witnesses and not judges. Perhaps this feeling is attributable to the fact that in England lawyers do not, as in this country they do, pervade the life of all communities, but the profession (as represented by the barristers who in the eyes of the man in the street typify it) is segregated, centralized and dramatized by the Inns of Court. This condition necessarily emphasizes the cleavage between the lay and the professional points of view. Whatever the reason, it is undeniable that in England, at least since the time of Erskine, the incomparable advocate (who was dwarfed in the House of Commons by Burke, Fox and Pitt), there has been a strong and undiminishing distrust of lawyers, both as legislators and leaders of public opinion. As Burke himself put it in replying to Erskine, the English "wish the country to be governed by law, but not by lawyers."

The task of law reform by laymen is rendered easier in England by the fact that the great bulk of important civil litigation is concentrated in London and that court proceedings there for many years have been excellently reported by the newspapers, particularly *The Times*. London is also the clearing house for informed British public opinion in a way that no American city has ever been. The publicist thus has his attention constantly challenged by the operation under his very eyes of the law's machinery.

All of this is in decided contrast with conditions in the United States where most law reforms are initiated by bar associations and left to the final decision of lawyer legislators.

It is not unlikely that this predominance of lay influence accounts for the faster pace of law reform in England; for, laying aside as unjust the criticism that self interest biases lawyers

1. For a recent brief but penetrating discussion of the cost of English civil justice, see *Solon* on *The Price of Justice*. By C. P. Harvey. Kegan Paul, Trench Trubner & Co. Ltd., London. E. P. Dutton & Co. New York. 1927. That civil litigation is more expensive in England than in the United States seems to be primarily due to a higher and more inclusive scale of taxable costs.

2. Expense of Litigation Report, London Chamber of Commerce, Apr., 1930, p. 6.

against reform, the profession as a whole is unquestionably conservative in lending its aid to any movement which means cutting loose from the ancient moorings.

This London Chamber of Commerce report of observed defects and suggested remedies, while highly suggestive to Americans, is also significant as disclosing that our problems are so different from theirs that, while our objectives may be the same, we must, in seeking them, pursue quite distinct paths. Much of the loose criticism of our courts and many of the invidious comparisons made between them and those of England entirely fail to take into account the fact that many English methods are entirely unadaptable to our needs while to the adoption of others there are insurmountable obstacles.

The pith of the report is that, while trials may perhaps be even further expedited, justice is in the main satisfactorily and, indeed, expertly administered, but at a cost which often makes it prohibitive to the ordinary litigant. The objective sought is to reduce the price without depreciating the value of the article. As the report itself puts it: "The English procedure, like so many products of England, is, apart from cost, the most perfect product of its kind in the world. Equally, like so many English products, it is an expensive luxury and beyond the reach of the majority of people unless they are either very rich or very poor."

As the most obvious economy the report expresses the opinion that the two branches of the profession, barristers and solicitors, should be fused, but refrains from making such a recommendation because it "is not yet practical politics and would arouse great opposition."[3]

Lord Bryce inclined to the opinion that neither the English nor American system should be changed, each being suited to the genius of the country where it obtains.[4] Since Bryce wrote American experience has not furnished any persuasive arguments in favor of the abolition of the English system. That system has created a small, compact, homogenous and highly organized Bar. This Bar deserves much of the credit for the expeditious and effective administration of British justice. It is true that the English judge has a firm control of the proceedings; but only rarely is it necessary for him to interpose. It is also true that the Inns of Court stand ready to hold the barrister strictly to his code; but formal action by them is infrequent. The Bar is a class affair with the *esprit* of a club in which certain things simply are not done.[5] Insulated as he is from the contact with the client by the presence of the solicitor the barrister's attitude is similar to that of a commissioned officer assigned to defend a private before a court martial. As a result there is no time wasted in jury selection; all testimony except that directed to controlling material matters is rapidly elicited by leading questions; objections to evidence are rare; arguments are concise and almost entirely free from any emotional appeal. The English barrister impresses an American lawyer as a highly skilled expert assisting the court and jury in quickly ascertaining the facts and as himself maintaining an air of detachment which seems to indicate that with the result of the trial he has no personal concern.

This is in refreshing contrast with conditions in this country where the leading lawyers in the larger cities shun the courts in favor of the greater rewards to be found in the office; where time is frittered away in selecting juries and examining witnesses as to irrelevancies; where cross examination is a confessional; and where the will to win so often triumphs over the desire to be fair.

Instead of American experience furnishing an argument for fusion in England it is fairly apparent that a retention of that system in this country would have saved us from many of the problems that perplex us. Indeed, were there not so many historical arguments against it, the adoption of the English system in this country might be considered as one of the possible remedies for our unsatisfactory administration of justice.

One of the most interesting phases of the report is that which discusses the question of whether the high cost of litigation is referable in part to excessive fees charged by barristers and solicitors. It was found that this is not the case and that the average income of barristers and solicitors is not greater than that of other professional men such as doctors, accountants and engineers. The committee expressed the opinion that "their remuneration under the present procedure is reasonable and the net income of the average legal practitioner in the interests of the public should not be reduced, having regard to the high standard of education and probity required in the legal profession, the long period of waiting before earning a living wage and the strict supervision exercised over the barristers and solicitors, especially the latter. In our opinion it is the system and the procedure, not the practioners, which are responsible for heavy cost."

The only criticism offered of fees was as to the so-called "two-thirds rule" by which junior counsel becomes automatically entitled to two-thirds of the fee of his leader. The committee thought that the party who instructs a leading counsel undoubtedly has an advantage over a party who can instruct only junior counsel. The pace is thus set by the richer litigants and when "the leader is an eminent one who commands a very high fee the brief fee of the junior thus automatically increases, although his responsibility on the trial may be decreased in consequence." The abolition of the two-thirds rule was therefore recommended.

It was found, however, that the main cause of expense is the English law of evidence which requires every document and every fact to be formally proved by the personal attendance of the parties and witnesses in court. The recommendations, therefore, were made: that all documents be accepted in evidence unless formally challenged and oral proof demanded, in which case the challenger should have to pay the costs of the oral proof un-

3. London Chamber of Commerce Report, p. 6.
4. Bryce's American Commonwealth, Vol. II, pp. 675-678.
5. Sir Edward Marshall Hall failed to obtain a coveted judgeship because it was felt that he had been accustomed to display too much zeal for his clients, while Edward Kenealy, the defender of the Tichborne claimant, was disbarred for an offence less serious than many which are every day ignored in American courts. During the trial of "a running down case." I inquired of one of the barristers engaged whether the attempt was ever made to acquaint the jury by suggestion with the existence of liability insurance. With a look of astonishment he replied: "No, indeed; that would not be crickt."

less the court otherwise orders; that evidence of witnesses be presented in the form of statements signed by the witnesses and attested by a credible witness, with the privilege of the opposite party to require the production of a witness for cross-examination on deposit of the cost of examination and witness expense, these to be paid by the challenger, unless otherwise ordered by the court; that evidence from abroad always be given by affidavit, declaration, or by written answers to written interrogatories.[6]

The suggestion was also made that in all cases involving technical matters an assessor should sit with the judge as adviser in the same way as the Elder Brethren of the Trinity House in Admiralty cases[7] to assess damages, no expert evidence to be given; that in cases involving over £2,000 parties should be allowed to put forward one expert on each side "to act as demonstrator of the technical points at issue but not as a witness"; that in cases involving over £10,000 the parties be allowed one expert witness on each side.

The report also recommended that pleadings be simplified and shortened and the printing of records on appeal be dispensed with.[8]

To one familiar with American courts an English trial seems brief to the point of laconicism, yet the committee thought "that the Bench seems disinclined to cut counsel short with the result that the proceedings are unnecessarily prolonged." One wonders, in view of this comment, what language the committee would regard as adequate to characterize an American trial.

As means of further expediting trials the committee suggested the setting of cases for days certain and the appointing of a business manager charged with the duty of arranging the lists.

The committee also mildly criticized the requirement that a witness stand in the box while delivering his testimony and cited the American method as preferable.[9]

The Lord Chancellor, on receiving this report, took the sensible course of submitting it for comment to the Law Society, representing the solicitors, and to the General Council of the Bar, representing the barristers.

The Law Society thought that "during recent years the amount of the fees paid to counsel has risen out of all proportion to the rise in the cost of living" and "that very often they are entirely out of proportion to the issue involved." After making this comment and defending the solicitors' costs, it contented itself with agreeing that pleadings and preliminary proceedings should be shortened and simplified and the two-thirds rule abolished.[10]

The General Council of the Bar thought that "there is some truth in the view expressed in the Chamber's report that English judicial procedure, though the most perfect of its kind in the world, has become an expensive luxury beyond the means of the majority of the people." It agreed that neither barristers nor solicitors received excessive remuneration.

Dealing with the specific recommendation of the Chamber's Report, the General Council, while expressing the opinion that the additional expense due to the rule of evidence which requires oral proof was exaggerated, thought that there was room for some saving of time and money. It therefore recommended: that all documents should be accepted in evidence without formal proof unless formally challenged or oral proof demanded, in which case the challenger should have to pay the costs of the oral proof unless the court otherwise ordered; that if both parties agree or the court so directs, evidence of witnesses may be presented in the form of affidavits[11]; that the party against whom an affidavit is tendered have an absolute right to reject it, in which case the cost of calling the witness should be paid by the rejector in any event, if the judge at the trial thinks the affidavit should not have been rejected; that evidence from abroad should not necessarily be given by affidavit or declaration, but should be so given unless otherwise ordered.

The General Council declined to concur in the Chamber's recommendation as to expert witnesses, and thought that the desired end could best be attained by allowing the master or judge to limit the number of experts. It suggested that much expense, time and worry would be saved if, when it is proposed to call an expert, a copy of his report were furnished the other side before trial.

The General Council disagreed with the proposal that an assessor should sit with the judge; thought that the two-thirds rule was "not to any important extent responsible for the excessive cost of litigation," but was willing to recommend its modification[12]; agreed that pleadings should be shortened and proceedings before trial expedited,

6. "The latter form, we are informed, works well in America. "Expense of Litigation Report, London Chamber of Commerce, p. 7. Apparently the committee excepts from this suggestion divorce, slander and libel cases. Libel cases are much more frequent in England than in this country. They have replaced the code duello as a means of vindicating personal honor. Juries are accustomed to returning substantial verdicts, particularly against newspapers, and not infrequently the plaintiff donates the proceeds of the judgment to charity, being himself satisfied with his vindication.

7. The Elder Brethern of the Trinity House sit with the judge in admiralty cases and are his advisers in technical matters.

8. At present records on appeal need not be printed in the Court of Appeals or Court of Criminal Appeals, but must be printed on appeal to the House of Lords or Privy Council.

9. During an English trial I once inquired of one of the barristers engaged whether he did not think it a bit unfair that the witness should be required to stand. He replied: "Ah, but we are required to stand while examining and cross-examining. Why should the witness have the advantage of us?" Perhaps the answer is that testimony would be more comfortably and colloquially delivered if both witness and counsel were allowed to sit.

10. Annual Report of The Council of the Law Society. (1931), pp. 138-143.

11. The General Council apparently accepted Lord Justice Bowen's dictum: "Truth will out, even in an affidavit."

12. In dealing with the two-thirds rule the General Council said:

"The Council has given most careful consideration to the matter referred to as 'the two-thirds rule,' i. e., the long-established practice under which Junior Counsel is entitled to a fee of from three-fifths to two-thirds of his leader's fee.

"The Council is satisfied that this practice is not to any important extent responsible for the excessive cost of litigation.

"In the ordinary run of cases, the application of the rule does not result in the junior having a higher fee than that to which he is reasonably entitled.

"The objections of the Chamber seem to be directed to the cases where a 'fashionable leader' is engaged, to use the phrase employed by the Chamber. The employment of leading counsel who come under this description is a luxury indulged in by wealthy individuals or corporations, and usually in cases where large sums are involved and the expense is relatively unimportant. There is no difficulty in securing the services of perfectly competent counsel who are not 'fashionable,' and who are content with moderate fees.

"The Council, therefore, is of opinion that this matter is not of real importance.

"At the same time, the Council is anxious to meet the views

that cases should be set for days certain and "that witnesses should be provided with a chair and should give their evidence sitting." It disapproved of the suggestion that a business manager be appointed, and recommended that there should be court shorthand writers.[12]

The comments of the Law Society and of the General Council of the Bar were submitted to the Chamber of Commerce Committee. On reconsideration, that committee adhered to all of its recommendations except that it receded from the suggestion that an assessor be appointed to sit with the judge.[14]

Thereupon, the Lord Chancellor called upon the Rules Committee to assist him in finding a solution.

The Rules Committee adopted the Rules of the Supreme Court (New Procedure) 1932, which make effective so many of the recommendations as the committee approved.

It excepted from the new rules actions for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise and actions in which fraud is alleged. These exceptions rest upon the feeling that, inasmuch as such actions involve personal honor, they should be tried according to the ancient forms.

The Rules Committee, in dealing with other actions, adopted the policy of leaving procedural changes to the judge hearing the summons for directions. He may, in his discretion, order the action of any issue therein tried with a jury or without a jury. He may order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness be read at the trial on such conditions as the judge may think reasonable, provided that where it appears to the judge that the other party reasonably desires the production of a witness for cross examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expense of such witness at the trial may be specially reserved. He may record any consent of the parties, either wholly excluding their right of appeal, or limiting it to the Court of Appeal or limiting it to question of law only.

"The Judge may order that any question involving expert knowledge shall be referred to a special referee for enquiry and report, and in particular and without prejudice to the general power, the Judge may refer to a special referee for inquiry and report any question arising as to the nature, extent and permanence of any injury caused or alleged to have been caused by the negligence of a party on the terms (a) that the report when received shall be communicated to both parties with a view to ascertaining whether they are willing before further expense is incurred to agree to accept the report in whole or in part; (b) that in so far as the report is not accepted by both parties it shall be treated as information furnished to the Court, and shall be subject to the criticism of any expert witness called at the trial, and shall be given such weight in deciding any question of difference between the expert witness as the Court shall think fit."

To make the action of the judge effective it is provided that there shall be no appeal, without his leave, from any decision as to any of these questions.

The suggestion is also adopted that the judge may fix a day for the trial of any new procedure action, and the action shall, as far as possible, be tried on that day.[15]

The rules thus in principle adopt the recommendation of the General Council of the Bar.

Marking as they do the most advanced position yet attained in English procedural reform, the New Rules of Procedure furnish to those interested in similar reforms in this country suggestions rather than a precedent. Some of the problems responsible for the investigation e.g., the separation of the two branches of the profession and the two-thirds rule, are entirely foreign to our experience. Even the underlying cause (the high cost of litigation) does not exist in this country in the same sense that it does in England. Instead of being an expensive luxury, in most states litigation, fostered as it is by the system of contingent fees and slight court costs, more nearly approaches a popular pastime.

While designed primarily to reduce expense the rules seek this reduction by expediting litigation. It is as pointing toward a possible solution of this latter problem—much more acute in the United States than in England—that the rules are most helpful to American law reformers.

Of the innovations adopted with this end in view one of the most drastic—the abolition of jury trials in all but a restricted class of cases—is, because of state and federal constitutional provisions guaranteeing the right of trial by jury, unlikely to make much headway in this country. Indeed, even in the absence of constitutional objections, it is doubtful whether there exists in the United States either among lawyers or litigants sufficient confidence in our underpaid and largely elective judiciary to create a willingness to entrust the trial judges with the discretionary and unreviewable power of dispensing with juries.

There are, however, three phases of the investigations, reports and rules which are applicable to American conditions and contain suggestions of great value: (1) the demonstration of the importance of the initiative and cooperation of lay agencies in overcoming the inertia and conservatism of lawyers, (2) the illustration of the manifest superiority of a rule-making as opposed to a legis-

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of the Chamber of Commerce, and would be prepared to recommend the following modification of the existing practice:

"Where the leader's fee exceeds 150 guineas, the junior's fee shall be a matter of arrangement, provided that in such cases the junior's fee shall not be less than 100 guineas, and in addition not less than one-third of that part of the leader's fees that is in excess of 150 guineas.

"But the Council is of opinion that if this modification is adopted the work of junior counsel in advising and drafting (which is admittedly underpaid, having regard to the difficulty and responsibility of the work) should be remunerated on a more adequate scale as suggested in the Report of the Chamber."

The action of the General Council of the bar was further reported in the London *Times* of July 9, 1932, "The General Council of the Bar with a view to assisting in a movement for reduction in the cost of litigation, is prepared to agree to a modification of the two-thirds rule so that in cases where the leader's fee exceeds 150 guineas the amount by which the Junior's fee exceeds 100 guineas may be a matter of arrangement." This modification is now in effect.

12. General Council of the Bar. Report on the Expense of litigation. 18th May, 1931.

Up to November 1, 1932, no action has been taken in the matter of allowing witnesses to sit while delivering their testimony. Of course it has always been in the discretion of the judge to allow a witness to be seated in the case of old age or infirmity.

14. Expense of Litigation. Memorandum on the Reports of the General Council of the Bar and the Law Society. London Chamber of Commerce, 30th July, 1931.

15. Rules of the Supreme Court (New Procedure), 1932.

lative body in effecting procedural reform, and (3) the precedent furnished for simplification in the taking of testimony.

Each of these suggestions is needed.

Laymen individually and collectively have rendered great service to the cause of procedural reform in the United States. That service, however, has been chiefly by way of fact-finding and criticism. There has been little direct action planned to achieve immediate results. Undoubtedly, both in Congress and the state legislatures would the cause of reform be advanced were similar bodies in this country to follow the example of the London Chamber of Commerce.[16]

That the rule-making power should be lodged, as in England, in courts, judicial councils, rules committees or other similar bodies is a principle now generally accepted by the bar and being rapidly recognized by the various state legislatures. The more exact knowledge of such experts and the greater flexibility of the rules under their control would seem to furnish conclusive arguments in favor of this system. Curiously enough, however, it seems that the court in which the American people have the greatest confidence will be the last to be entrusted with this power. Notwithstanding the insistence of the American Bar Association for more than eighteen years, Congress has consistently refused to empower the Supreme Court of the United States to prescribe by general rules the practice and procedure in actions at law.[17]

The desirability of such uniform rules is obvious. But if proof is needed, it is amply furnished by the salutary effect of the uniform equity, bankruptcy and admiralty rules adopted by the Supreme Court.

Perhaps the history and efficacy of the New Rules of Procedure may, in some slight degree at least, tend to overcome the parochialism of those senators and representatives who have so far opposed such legislation.

To the simplification of the taking of testimony there is in this country but one obstacle—American conservatism, which is probably today the most tenacious in the world. The extent of this conservatism is indicated by the fact that the National Conference of Commissioners on Uniform State Laws, though it has considered a Uniform Civil Depositions Act, has never yet suggested that present rules be so far relaxed as to permit the giving of testimony by affidavit.[18]

In comparing or contrasting the movements for procedural reform in England and in the United States it must constantly be borne in mind that theirs is a battle of movement with but a single position to be captured—while ours is a war of attrition which must be ceaselessly waged upon forty-nine distinct fronts. Thus are our difficulties multiplied. But, as the New Rules of Procedure again remind us, it is a war which must be won, unless we are content in this to become—or, more accurately, to remain—one of the backward nations.

16. The most notable recent program for legal reform formulated by a lay organization in the United States is that of the National Economic League. See The Consensus, Vol. XVI, No. 3, October, 1931, and Vol. XVII, No. 2, October, 1932.

17. At the Washington (October, 1932) meeting of the American Bar Association the Special Committee on Uniform Judicial Procedure recommended that "in view of the apparent sentiment in the Senate and in the House of Representatives against any bill vesting in the Supreme Court of the United States the power 'to adopt such rules' no attempt be made by the Association to have such bill passed at this time."—Report of the Special Committee on Uniform Judicial Procedure. Committee and other reports presented at the 55th Annual Meeting of the American Bar Association, Washington, D. C., October 12-15, 1932. Pp. 232-233.

The attitude of Congress, is, of course, attributable not to distrust of the Supreme Court, but to its response to the reluctance of the lawyers in the various states to have repealed the Conformity Act (U. S. Code Title 28, Sec. 724) under which the practice in the Federal Courts on the law side is assimulated to that of the State in which they sit. Added to their unwillingness to learn a new practice is the fear of these lawyers that a nationwide uniformity may obviate the necessity of associating local counsel.

18. Report of Committee on Uniform Civil Depositions Act and First Tentative Draft of Uniform Civil Depositions Act. National Conference of Commissioners of Uniform State Laws. Committee Reports presented at Forty-Second Annual Conference, Washington, D. C., October 4-10, 1932. Pp. 178-186.

The Cleveland, O. Bar on the Air

THE series of radio broadcasts given over the National Broadcasting Station WTAM in Cleveland on Saturdays from 6:15 to 6:30 P. M., arranged by the Committee on Americanization of The Cleveland Bar Association, Joseph Saslaw, Chairman, is attracting nation-wide attention, we are informed. Requests for copies of the addresses, which were published in the Daily Legal News after delivery, are being received from states throughout the Union and from Canada.

Sixteen addresses have been delivered. Among the speakers and the subjects have been: William H. Boyd, President of The Cleveland Bar Association, "The Railroad Problems"; D. B. Robertson, President of the Brotherhood of Locomotive Engineers and Firemen, "Railroad Consolidation"; Max Hayes, labor leader, "Labor Problems"; Chief Justice Carl V. Weygandt of the Ohio Supreme Court, "Americans and Their Courts"; Common Pleas Judge George B. Harris, "Cleveland's Greatest Assets"; Welfare Director Bernice S. Pyke, "Cleveland's Welfare Problems."

The schedule for the immediate future includes the following: Jan. 14, Joseph Saslaw, "Brandeis, The Liberal"; Jan. 21, Murray D. Lincoln of Columbus, Secretary of the Ohio Farm Bureau, "The Farmer's Present Problems"; Jan. 28, Dr. W. E. Wickenden, President of Case School of Applied Science, "Is Science Too Fast?"; Feb. 4, W. F. Whitney, President of the Brotherhood of Railroad Trainmen, subject to be announced later.

On March 17th from 7:00 to 7:30 P. M., Newton D. Baker will broadcast a talk on the subject "Prejudices," which will be broadcast from coast to coast.

THE OIL CASES AND THE PUBLIC INTEREST

Cautious and Individualistic Attitude of Courts When First Confronted with Problems Due to Rapid Growth of the Oil Industry—Later Tendency to Yield More and More to Certain Paramount Necessities—Although in Nearly All the Cases a More or Less Deliberate Attempt Is Made to Base the Decision on Some Right of an Adjacent Property Owner, the Paramount Right of the State Has Always Been in the Background — Champlain Refining Company vs. Corporation Commission of Oklahoma Solves Many Problems and Is Epoch-making in Its Nature, etc.

By Andrew A. Bruce
Professor of Law in Northwestern University

In the year 1931 the legal profession was somewhat startled, not only by the entrance of the military into the field of government, but by an attempt in the oil fields of Oklahoma, Texas, and California, to arbitrarily determine the quantity of production.[1] Although much that was then done was perhaps extra legal, there was, and still is, a crying need for a facing of the economic issues and for some action, and this, not only for the protection of the oil producers themselves, but for the preservation of our natural resources and the ultimate benefit of the consumer himself.

Industrially and economically, America has been growing too fast for its legal machinery at all times to properly function; too rapidly for its social and economic policies always to be properly rationalized and the old law and the old legal and economic conceptions of personal and property rights to be made adequate to our changing conditions and to our marvelous industrial development. Often the courts have been called upon to decide rights and theories after a *fait accompli*, and have acted as statesmen rather than as logicians and lawyers. As such, they have adapted themselves and the law to the new and changing conditions and to the absolute necessities. Even at the expense of violating logic and time-established theories, they have refused to "half a league behind pursue the accomplished fact with flouts and flings." This was the situation in the irrigation and water right cases of the west. There the communities in the early years were far removed from the eastern centers of government, and were compelled to work out their own salvation. They were confronted with the problems of irrigation and the use of water for mining purposes, which were unknown in England and in the eastern states. They therefore as between themselves and by common consent repudiated the old theories as to the rights of lower riparian owners and adopted the theory of the prior beneficial use. When the federal courts came to function they were not inclined, merely for the sake of an old rule and an old theory, to destroy established industries or to interfere with the processes of making the desert blossom as a rose. They therefore forgot logic and wisely and beneficently adopted the theory of the prior beneficial use.[2]

To a very large extent, a similar situation has arisen in the oil fields. A century ago men hardly knew that there was such a thing as oil.[3] Twenty years ago they had no conception of the enormous possibilities of the industry and of the part that oil would play in our national development. When they were first confronted with the problem, the courts were extremely individualistic and were very cautious.[4] They are cautious still, but everywhere they are coming to yield to the paramount necessities.[5] Four things are apparent. One is, that the reckless waste of our natural resources will in some way be prevented. The second is, that the stabilization of the oil industry and the proper marketing of our oil products will in some way be brought about. The third is, that whatever is accomplished will be accomplished through the proper legal and legislative channels, and not by means of a military despotism or gubernatorial fiat. The fourth is, that the states will more and more be conceded a paramount interest in their own natural resources which, though privately owned, are so necessary to their well being and add so much to their corporate wealth. More and more there will be conceded to them the right to protect these resources from reckless exploitation. Fortunately, perhaps for all of us, the controversies have now got into the hands of the federal courts and we have every reason to believe that those courts will feel their way (and in matters such as these it has usually been their custom to cautiously feel their way) to a satisfactory solution of the problems. The problems, however, are difficult and in their solution strict logic may have to yield to the demands of paramount necessities, and perhaps both the state and the federal courts will be compelled to overrule prior decisions. Especially must this be

1. Bruce, The Oil Situation and the Military, 17 American Bar Association Journal, 643.

2. Bruce, Conservation of Our National Resources, 49 University of Pennsylvania Law Review, 125; Kansas v. Colorado, 185 U. S. 125.

3. The industry was probably originated by the drilling of a well at Titusville, Pennsylvania, in 1859.

4. At an early time the Courts of West Virginia considered oil as stationary and in the same light, as far as the ownership of the landowner was concerned, as timber coal or iron ore. Williamson v. Jones, 39 W. Va. 231.

5. Even the courts of Texas and Indiana, which at an early time announced and still in theory adhere to the doctrines of the title to oil in place, go to great lengths in protecting the common interests of the other owners in the same oil basin or oil area. Peterson v. Grayce Oil Co. (Tex.) 37 S. W. Rep. (2d) 376; Ohio Oil Co. v. Indiana, 177 U. S. 190; Constantin v. Smith, 57 Fed. (2d) 227. See Peoples Gas and Oil Co. v. Tyner, 131 Ind. 277.

the case in the states where the doctrine of the title to oil in place has been applied, and the owner of land has been held to have an absolute title to the oil beneath the surface, even though it must be apparent that as he pumps out the oil the vacuum must be filled by the oil which is drawn from the land of his neighbors, or of the common oil bed.[6]

After some years of doubt among lawyers and judges, even if not among geologists,[7] the theory has been adopted that oil deposits are in the nature of underground sponges of sand rock or of sand and gravel and that an oil well sunk at any particular point tends to drain the area of a certain oil bed. It was therefore soon quite generally held, and even in the states where the doctrine of the title to oil in place had been announced, that though the owner of a particular piece of land had the right to sink his oil wells and reasonably drain that area, he could not adopt wasteful methods or allow the oil to run off or the gas escape into the air, to the detriment of other property owners in the particular area. In many cases an analogy was made with animals *ferae naturae*, but an analogy which was based on the individualistic theory of the rights and ownership of the adjacent landowners in the particular oil basin or area and not of the rights of the state as the ultimate owner or the owner in trust for the benefit of all of its citizens.[8]

At first and as long as the well owners did not allow the oil to go to physical waste and as long as they beneficially used as far as they themselves were concerned, no restraint was generally imposed upon their operations and methods of production as far as quantity was concerned,[9] or on the uses which were made of the oil after its extraction.[10] Soon, however, the courts began to sustain statutes which insisted upon a measure of fairness toward the other oil land owners in regard to the methods used,[11] and a few even upon the most beneficial use of the oil after it had been acquired.[12] Practically all of the courts came to sustain statutes which sought to prevent the flooding of the oil area with water through careless drilling and failure to plug unused gas and oil wells,[13] though there is a decided conflict in the authorities on the question whether in the absence of a statute upon the subject such waste and injury to the owners in the common oil or gas bed or area would furnish a basis for an action at law or a suit in equity.[14]

All of these cases, however, were concerned with what may be termed physical waste. They had not decided, and were not called upon to decide, whether the state could prevent the production of oil by any owners or prevent the owners who were first in the oil area or had the capital sufficient to start the most numerous wells, from pumping the oil or producing the gas in such quantities that the market would be glutted and that, though no oil or gas would be actually lost, it would have to be sold at a low price. They had not decided whether, for the sake of the other oil producers and for the state itself, which would be benefited by its citizens making all of the money possible and getting the highest return for the natural resources of the oil or gas *ferae naturae*, which the state allowed them to own and to possess, the state might regulate or pro-rate the amount of production. This was the chief point at issue in the Texas and Oklahoma oil fields.[15] There was also involved the question of martial law, and whether the Governor, if he thought that the Legislature or the agencies or commissions appointed by the Legislature, were not sufficiently preventing this over-production, had the right to himself enter into the oil field and order the militia either to take possession of the fields and to operate them, or to prevent the owners from producing oil beyond the amount which he, the Governor, thought to be wise and profitable.[16] It was, of course, conceded that in case of riot and disturbance, the Governor could call out the militia in aid of the civil authorities or of the courts, but whether the Governor himself could take possession, was another question. It was conceded that the Governor could call out the militia and that he was the sole judge of the exigency. It was not conceded, however, that he was the *sole* judge of the fact as to whether the courts and the ordinary agencies of the government had so ceased to function; that private property could be taken and controlled by the military forces, and private rights of liberty and property be determined. It was claimed, indeed, that the calling out of the troops was one thing, and the use that was to be made of them, was another. The one was under the control of the Governor, the other under the control of the civil government and of the courts.[17]

May a state take measures to see that the oil in its borders, or in a certain area, may all be sold

6. Bodcaw Lumber Co. v. Goode, 160 Ark. 48; Rupel v. Ohio Oil Co., 176 Ind. 4; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335; Marrs v. City of Oxford, 22 Fed. (2d) 134; Gas Products Co. v. Rankin, 63 Mont. 372; Kelly v. Ohio Oil Co., 57 Ohio St. 217; Erie v. Commission, 278 Pa. 502; Murray v. Allard, 100 Tenn. 100; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509; Musgrave v. Musgrave, —— West Virginia, 119.

7. In some early cases the law governing stationary minerals was applied and in others that of underground streams: Donald H. Ford, "Controlling Oil Production," 20 Mich. Law Rev. 1170; Veasy, "Law of Oil and Gas," 13 Mich. L. Rev. 445; Williamson v. Jones, 39 West Va. 231—Underground Stream Theory: Dark v. Johnston, 55 Pa. St. 164; People's Gas and Oil Co. v. Tyner, 131 Ind. 277; 18 Mich. Law Rev. 445. But see Ohio Oil Co & Indiana, 177 U. S. 190.

8. See Ohio Oil Co. v. Indiana, 177 U. S. 190; Westmoreland and Cambria Gas Co. v. De Witt, 130 Pa. St. 235; Brown v. Spilman, 155 U. S. 665.

9. Hague v. Wheeler, 157 Pa. St. 324; "The owner of the soil has the right to collect by wells and to use, without limitations of amount or use to which it is put, the water percolating or flowing beneath the surface, though he drains thereby, the well of a neighboring proprietor to his damage." Syllabus in Houston and T. C. Ry Co. v. East, 98 Tex. 146.

10. Houston and T. C. Ry. Co. v. East, 98 Tex. 146.

11. Use of Vacuum Pumps prohibited: Peterson v. Grayce Oil Co., 37 S. W. (2d) 367, where the court said: "Although oil is of a fugitive nature and may, as the result of the operation of natural subterranean agencies pass from one location to another, yet it is well settled by the decisions of our Supreme Court, that oil in place belongs to the owner of the title to the land, and that an oil lease executed by the fee-simple owner conveys an interest in realty. See Waggoner Estate v. Sigler Oil Co., 19 S. W. (2d) 27, by our Supreme Court, in an opinion by Justice Greenwood, in which many of the former decisions of the same court are extensively reviewed. From that rule of decisions it follows that oil in place and belonging to the title owner or leaseholder of the land where it is located may, like surface accretions of the soil, be lost to the owner and become the property of the title holder or lease holder whenever such flow occurs solely through the operation of natural agencies in a normal manner, as distinguished from *artificial means applied to stimulate such a flow.*"

Even in Hague v. Wheeler, 157 Pa. St. 324, the court said: "Now it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction by acts regulating the plugging of abandoned wells, but it is not the public interest that is involved in this litigation."

12. Extraction of Carbonic Acid Gas from mineral springs prohibited, Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; Manufacture of carbon prohibited, Wills v. Midland Corporation, 264 U. S. 300; Flambeau lights prohibited, Townsend v. State, 147 Ind. 624.

13. Verland Oil and Gas Co. v. Walker, 100 Okla. 258; State v. Lebow, 128 Kan. 715; Southwestern Oil and Gas Co. v. Kimball Oil & Development Co. (Tex.) 234 S. W. 1111.

14. Relief is allowed in the cases of Manufacturing Gas and Oil Co. v. Indiana, Natural Gas and Oil Co., 155 Ind. 46; Louisville Gas Co. v. Kentucky Heating Co., 117 Kentucky 71; Higgins Oil and Fuel Co. v. Guaranty Oil Co., 145 La. 233. It is denied in Hague v. Wheeler, 157 Pa. St. 379; Jones v. Forest Oil Co., 194 Pa. St. 379.

15. See Bruce, The Oil Situation and the Military, 17 Am. Bar Assn. Journal 642; 7 U. S. Daily 2879, 2893.

16. Bruce, The Oil Situation and the Military, 17 Am. Bar Assn. Journal 642. Constantin v. Smith, 57 Fed. (2d) 227.

17. Opinion of Judge Hutchison in Constantin v. Smith, 57 Fed. (2d) 227. Affirmed in Sterling v. Constantin et. al., 53 Sup. Ct. Rep. 190.

at a reasonable profit, and that no one owner of land who is willing to sell at less than a reasonable profit, or who has the superior drilling facilities which make it possible for him to sell at a reduced rate, or who has exercised more diligence in installing his pumping apparatus, shall exhaust the common supply of oil during the period of low prices? Our answer is, that in extreme situations the courts will recognize the exigencies, and that though, perhaps, for some time they will hesitate in saying that this can be done directly, they will allow it to be done indirectly. They will stretch the theory of physical waste to the uttermost—will perhaps turn some judicial handsprings. Ultimately, they may come to recognize the paramount interest of the sovereign state in its own welfare and in its own resources.

Although, indeed, in nearly all of the cases a more or less deliberate attempt is made to avoid the question and to see some right of an adjacent property owner which may justify the decision, the paramount right of the State has always been in the background. Waste certainly may be prevented and the escape of the gas or of the oil without being utilized, but what if the particular defendant were a large corporation or property owner who owned the whole oil bed or oil area?[18] Throughout the cases, indeed, is hidden the argument of the Supreme Court of Indiana in Townsend v. State,[19] in which it was held that the legislature could prohibit the use of natural gas in flambeau lights and in which it was said:

"It is true that natural gas when brought to the surface and secured in pipes is property belonging to the persons in whose pipes it is secured. But the act in no way deprives the owner of the full and free use of the property. It restrains him from wasting the gas *to the injury of others or to the injury of the public.* It might present a very different and serious question whether the legislature has the power to prevent him from wasting his own property, if by so doing he in no way injured others, as appellant's learned counsel erroneously assume. In *Gas Company v. Tiner,* 131 Ind. 277, this court, appropriating the language of the Supreme Court of Pennsylvania in *Gas Co. v. Dewitt,* 130 Pa. 235, said: 'Water and oil and, still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae,* in common with animals and unlike other minerals they have the power and tendency to escape without the volition of the owner. . . . They belong to the owner of the land and are a part of it so long as they are on it or in it and are subject to his control; but when they escape and go into another land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land taps your gas, so that it comes into his well and under his control, it is no longer yours but his.' It is not to prevent an adjoining or distant owner from doing this that the act in question was passed. But it was to prevent him from needlessly wasting the gas which he is drawing from *the general reservoir which nature has furnished* and which experience and prudence teach is liable to be exhausted."

It is quite clear that even though the Indiana act may not have prevented the owner of the land from pumping his oil, it more than indirectly prohibited the sale to those who desired to purchase it for flambeau or torch uses. In the case of *Walls v. The Midland Corporation Company*[20] also a statute was sustained which interfered with both the oil producers and the purchasers and prohibited the manufacture of carbon from the oil product. In the case of *Lindsley v. Natural Carbonic Gas Company,*[21] the extraction of carbonic acid gas for commercial purposes from mineral springs was prohibited.

It is true that in the case of *Hague v. Wheeler,*[22] the court even went so far as to hold that another property owner in the same area could not compel the closing of a gas well which did not produce gas in paying quantities and from which the gas was allowed to escape into the air and stated that: "The owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of the tract belong to him according to its nature. The air and the water he may use. The coal and iron or other solid minerals he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner, to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface it is his absolutely, to sell, to use, to give away or to *squander,* as in the case of his other property. In the disposition he may make of it he is subject to two limitations: he must not disregard his obligations *to the public,* he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate *any rule of public policy* or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or to the health of others, such use or waste may be restrained, or damages recovered therefor; but subject to these limitations, his power as an owner is absolute, *until the legislature shall, in the interest of the public as consumers,* restrict and regulate it by statute." Yet the phrase, "until the legislature shall in the interest of the public as consumers restrict and regulate it by statute," is full of significance. Not content, also, with this statement and in the same opinion the court adds: "Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells, but it is not the public interest that is involved in this litigation."

Though, in fact, in the particular case redress is denied to the adjacent landowner, the right of the

18. In the cases of Champlin Refining Co. v. Corporation Commission of Oklahoma, 52 Sup. Ct. Rep. 559 and Danciger Oil and Refining Co. v. Railroad Commissions of Texas, 47 S. W. 65 (2d), it is intimated that an excessive production in one area or bed compels wasteful and excessive activity in others, as all producers are selling in the common market and each will be induced to hasten to get to that market before the price is further reduced. It is also suggested that excessive production leads to wasteful methods of open pit storage and if it produces a glut in the market, a shutting down and abandonment of marginal wells which will lead to water infiltration and waste of gas pressure.

19. 147 Ind. 624.

20. 245 U. S. 300.

21. 220 U. S. 61.

22. 157 Pa. St. 324.

State to properly conserve its natural resources is clearly admitted. Though the court chiefly dwells upon the interest of the ultimate consumer it also suggests a public policy and the public interest. Surely it is in accord with sound public policy that a great source of wealth and even of future possible taxation shall be adequately preserved.

Though in the case of *Alfred Macmillan et al. v. R. R. Commissioners,*[23] in which the court was only called upon to decide, and only directly decided, that no power to enforce proration had been conferred by the Legislature on the Board of Railroad Commissioners, its dicta certainly pointed to the conclusion that the power of the Legislature itself could only be exercised to the extent of preventing physical waste to the detriment of the adjacent land owners, and did not embrace "the artificial forcing of prices by governmental action in cooperation with those engaged in the oil industry, interested in raising prices, either by stimulating demand or by keeping the supply in bounds," in the recent case of *Bandina Petroleum Company v. Superior Court*[24] (1931) we find a desperate, though of course, successful attempt to sustain economic and price control under the theory of physical waste. The case involves the use and the extraction or waste of gas and not of oil, and justifies a limitation upon the amount of gas extracted or used, not because gas or oil can not be sold on the market at a reasonable price, but because a certain amount of gas is necessary to the raising to the surface and the recovery of the oil itself. It also approved the holding of the state court that under the circumstances it might be concluded that there was an unreasonable use of gas and that this unreasonable use was injurious to the other oil producers and *to the industry itself.*

The court said that, "Oil in this State (California) is found under layers of rock in a sand or sandstone formation termed lentil, under pressure caused by the pressure of natural gas within the formation. The layers of rock thus form a gas-tight dome or cover for the oil reserve. The oil adheres in the interstices between the sand particles and the natural gas may be in a free state at the top of the dome but it is also in solution with the oil, thus increasing the fluidity of the oil and the ease with which the oil is lifted with the gas in solution when the pressure on the gas is released by drilling into the oil sand. It is estimated that only from 10 to 25 per cent of the total amount of oil deposited in a reservoir is ultimately recovered, depending upon the natural characteristics of the reservoir and the methods employed in the lifting power of the gas. The importance of gas in the oil producing industry has therefore become a question of great concern to the *industry itself and to Government,* to the end that its functions may be fully utilized without waste. It fairly appears on this application that depending upon its location in the oil reservoir the extent of the oil sand, the degree of pressure within the formation, the amount of oil in the sand, the amount of gas in solution with the oil, the poracity of the sand, and other considerations, each oil and gas well has a best gas and oil ratio in the utilization of the lifting power of the gas and the production of the greatest quantity of oil in proportion to the amount of gas so utilized and which may be computed as to each individual well to a reasonable degree of certainty and be regulated accordingly." In view of these circumstances, the United States Court concluded that it might be said that there was an unreasonable waste of gas where it has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion. It was such a waste of gas, the Court said, that the Legislature of California intended to and could prohibit.

This case is of more than passing interest and suggests much more than the tendency to justify economic and price control under the theory of physical waste. In its expression "the importance of gas in the oil producing industry has therefore become a question of great concern to the industry itself and to government" it speaks not of the rights of the adjacent land owners only but of the industry and of the government. We wish, however, that the court had fairly faced the question of the State's interest and of the State's measure of control based on that interest as opposed to that of adjacent property owners.

The recent case of *Champlin Refining Company v. Corporation Commission of Oklahoma,*[25] solves many problems and is epoch-making in its nature, and in considering it it is to be noticed that the opinion is written by as conservative a judge as Justice Pierce Butler and is unanimously concurred in by the remainder of the judges. In spite of the intimation by way of dicta in the case of *Alfred MacMillan et al v. Railroad Commissioners,*[26] that the power of the Legislature could only be exercised to the extent of preventing physical waste to the detriment of the adjacent land owners and did not embrace "the artificial forcing of prices by governmental action in cooperation with these in the oil industry interested in raising prices either by stimulating demand or keeping supply in bounds," the Supreme Court of the United States, though it did not directly approve the right of price control, accomplished the same result by giving validity and effectiveness to the state enactments. It in fact made operative and enforceable and upheld the validity of Chapter 25 of the Laws of Oklahoma enacted February 11, 1915 which, in seeking to prevent waste, provided "that the term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands," and which provided "that whenever the full production from any common source of supply of crude oil or petroleum in this state can only be obtained under conditions constituting waste as herein defined, then any person, firm or corporation having the right to drill into and to produce oil from any such common source of supply may take therefrom only such proportion of crude oil or petroleum that may be produced therefrom without waste as the production of the well or wells of any such person, firm or corporation bears to the total production of such common source of supply," and which authorized the Corporation Commission "to so regulate the taking of crude oil or petroleum from any, or all, such common sources of supply within the State of Oklahoma as to prevent the inequitable or unfair taking from a common source of supply of such crude oil or petroleum by any person, firm or corporation and to prevent a reasonable discrimination in favor of such common source of supply as against another."

The Court said that "the Act prohibits the production of petroleum in such a manner or under such

23. 51 Fed. (2d) 400.
24. (1931) 52 Sup. Ct. Rep. 103.
25. (1931) 52 Sup. Ct. Rep. 559.
26. (1931) 51 Fed. (2d) 400.

conditions as to constitute waste. Section 1. Section 3 defines waste to include, in addition to its ordinary meaning, economic, underground and surface waste and waste incident to production in excess of transportation or marketing facilities or reasonable market demands and empowers the Commission to make rules and regulations for the prevention of such waste. Whenever full production from any common source can only be obtained under conditions constituting waste, one having the right to produce oil from such sources may take only the proportion that his wells bear to the total . . . and the Commission is directed to promulgate rules and regulations and to use such agents as may be necessary to enforce the act. Section 5. Since the passage of the Act the Commission has from time to time made proportion orders.

"The Commission construes the Act as intended to empower it to limit production to the amount of the reasonable daily market demand and to require ratable production by all taking from the common source . . . It found that the existing stocks of crude in storage exceeded the needs of the industry and the purchasers were unwilling to buy in Oklahoma for storage in any amount sufficient to take the surplus of potential production in that state."

"None of the Commission's orders has been made for the purpose of fixing the prices of crude oil or has had that effect. When the first order was made the price was more than $2.00 per barrel, but it declined until at the time of the trial it was only $0.35. In each case the Commission has allowed to be produced the full amount of the market demand for each pool. It has never entered any order under section 2 of the Act.

"It was not shown that the commission intended to limit the amount of oil entering interstate Commerce for the purpose of controlling the price of crude oil or its products, or of eliminating plaintiff or any products or refiner from competition, or that there was any combination among plaintiff's competitors for the purpose of restricting interstate commerce in crude oil or its products, or that any operators' committee made up of plaintiff's competitors formulated the proration orders.

"The evidence before the trial court undoubtedly sustains the findings above referred to, and they are adopted here.

"Plaintiff here insists that the act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

"We need not consider its suggestion that the business of production and sale of crude oil is not a public service, and that it does not devote its property to the public use. The proration orders do not purport to have been made, and in fact were not made, in respect of services or charges of any calling so affected with a public interest as to be subject to regulation as to rates or prices.

"Plaintiff insists that it has a vested right to drill wells upon the lands covered by its leases and to take all the natural flow of oil and gas therefrom so long as it does so without physical waste and devotes the production to commercial uses. But if plaintiff should take all the flow of its wells, there would inevitably result great physical waste even if its entire production should be devoted to useful purposes. The improvident use of natural gas pressure inevitably attending such operations would cause great diminution in the quantity of crude oil ultimately to be recovered from the pool. Other lessees and owners of land above the pool would be compelled, for self-protection against plaintiff's taking, also to draw from the common source and so to add to the wasteful use of lifting pressure, and because of the lack, especially on the part of the nonintegrated operators, of means of transportation or appropriate storage and of market demand, the contest would, as is made plain by the evidence and findings, result in surface waste of large quantities of crude oil.

"In Oklahoma, as generally elsewhere, landowners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction, or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface, and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool. *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729; *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 77, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; *Bandini Co. v. Superior Court, Los Angeles County, Cal.,* 284 U. S. 8, 19 et seq., 52 Sup. Ct. 103, 76 L. Ed. 123; *Brown v. Spilman,* 155 U. S. 665, 669, 15 Sup. Ct. 245, 39 L. Ed. 304; *Walls v. Midland Carbon Co.,* 254 U. S. 300; 323, 41 Sup. Ct. 118, 65 L. Ed. 276; *Rich v. Doneghey,* 71 Okla. 204, 177 P. 86, 3 A. L. R. 352; *People v. Associated Oil Co.,* 211 Cal. 93, 100 et seq., 294 P. 717."

Though this case is broad and sweeping, if it is based on the theory of a joint ownership in the oil bed or oil area, it is hardly applicable to those states where the theory of an absolute title to oil in place, illogical though it may be, is still adhered to. In such states as Texas indeed either the rule of title to oil in place must be overruled, and this has become a rule of title and cannot be easily disposed of, or a broader theory of a paramount state interest must be evoked. Why, indeed, did not the courts boldly assert it?

(To be concluded in next issue.)

Receiverships

"The Bar association has performed, rather tardily, an important public service, and also a clear duty, in calling attention to the gross abuse of charges in receivership cases. It is incontestable that, as a supplemental report asserts, 'these are times of intense financial distress,' and 'if ever the bar were called upon to exercise restraint in the matter of fees, if ever the bench were called upon to be vigilant in protecting the unfortunate, it is now.'

"It is a deplorable fact that this restraint and this vigilance have been wanting in far too many cases, and the situation needs immediate correction. The Bar association presents a schedule of fees which, in the opinion of the majority of its committee, would be fair. A minority proposes lower charges, and this also should be considered. Proper compensation should not be denied for often onerous and difficult services performed, but abuses should be drastically eliminated. We cannot absolve the courts from responsibility for these abuses, for they are the chief and final protection of all parties and should be alert to enforce equity upon all concerned."—*Chicago Tribune,* Jan. 23.

LOGAN AND LINCOLN*

Striking Contrast in Characters of Two Men Who Formed Law Partnership Announced in Springfield Newspapers of May 14, 1841—Firm Involved in Singular Case at Outset—A False Confession and a Triumphant Acquittal — Civil Causes Constituted Bulk of Practice—Lincoln Improves Rapidly as Lawyer—Partnership Dissolved but Steadfast Friendship Remained

By William H. Townsend
Member of the Lexington, Kentucky, Bar

IT is doubtful if two law partners were ever more unlike than Abraham Lincoln and Stephen Trigg Logan. Both were Kentuckians, Logan twelve years older than Lincoln; both were careless in dress, and each had an unusually lucid and logical type of mind; neither ever united with any church organization, yet both were diligent students of the Bible.

Logan, however, was short of stature, slight of build, even delicate in appearance; Lincoln was tall and muscular, big boned, though lean in flesh. Logan was austere in demeanor, while Lincoln, in spite of his occasional spells of gloom, possessed an acute, unfailing sense of humor. Logan carefully prepared his cases; Lincoln at this period of his career was much inclined to extemporize. Logan was a good collector, tight-fisted and farseeing in money matters; Lincoln was utterly indifferent to material gain. With Logan every activity was subordinate to his profession; Lincoln's chief interest lay in the field of politics, to which the law afforded convenient access.

The firm of Logan and Lincoln was announced in the Springfield newspapers May 14, 1841, and I have Lincoln's statement in his own handwriting that the partnership continued "to the autumn of 1844" instead of the fall of 1843, as most biographers have supposed.

The first office of the firm was in a one-story frame building on the east side of North Fifth Street, opposite "Hoffman's Row," where the office of Stuart and Lincoln had been located. Sometime thereafter Logan and Lincoln moved to the third floor of what was then the most pretentious business house in Central Illinois, which still stands at the southeast corner of the public square in Springfield.

The partnership was hardly a month old before Logan and Lincoln found themselves engaged in the most singular case Lincoln ever tried—one that is still unparalleled in the criminal annals of Central Illinois. Three brothers—William, Henry and Archibald Trailor, natives of Kentucky, had moved to Illinois in 1829, William settling in Warren County, more than a hundred miles northwest of Springfield, Henry at Clary's Grove, twenty miles from Springfield, and Archibald taking up his residence in Springfield. With William Trailor there lived, at the time of this incident, an eccentric character by the name of Archibald Fisher, a school teacher and jack-of-all-trades, who by frugality and thrift had accumulated several hundred dollars, which he refused to deposit in a bank.

One morning, the last of May, 1841, William Trailor and Fisher started together in a one-horse buggy for Springfield, where Fisher intended to enter some land. They reached the home of Henry Trailor at Clary's Grove on Sunday evening, and on the next day, July 1st, about noon, the two brothers and Fisher arrived in Springfield. They stopped at Archibald Trailor's boarding-house, and after dinner the three brothers and Fisher started out for a stroll. About supper time the Trailors returned to the boarding-house without their companion, and explained that as they were walking along a footpath on the outskirts of town Fisher had dropped behind and had not been seen again. That evening an effort was made to locate the missing man, without success, and on the following day a thorough search was begun for him by his Springfield friends. In the midst of the investigation William Trailor hitched up his rig and announced his intention of going home, but was persuaded by his brother, Archibald, to remain until the next day, at which time, nothing having been heard of Fisher, William and Henry left the city for their homes.

Some ten days later, on June 12th, the postmaster of Springfield received a letter from the postmaster at Greenbrush, in Warren County, stating that William Trailor had returned home and was circulating a report that Fisher was dead and had left him $1,500.00. This news threw the town into the wildest excitement, and, the immediate arrest of the Trailors being demanded, officers were dispatched in haste to arrest William and Henry.

On Monday the 15th Henry was brought into Springfield, lodged in jail and vigorously and repeatedly interrogated by the Mayor and Josiah Lamborn, the Attorney General. The prisoner, however, protested his innocence, and stoutly denied any knowledge of Fisher's whereabouts, but the prosecutors reminded him that the evidence against him and his two brothers was overwhelming, that they would certainly be hanged, and that the only chance to save his own life was to become a witness for the State.

Finally on Wednesday Henry weakened under the tremendous pressure and, although maintaining his own innocence, confessed that his brothers, William and Archibald, had murdered Fisher

*This is the second of a series of articles written by William H. Townsend especially for the American Bar Association Journal on Lincoln's law partnerships. The first, entitled "Stuart and Lincoln" appeared in the Journal February, 1931.

by knocking him in the head with a club; that they had temporarily concealed the body in a thicket, and that the first he had known of the crime was when they had sought his assistance in disposing of the body. He then related in minute detail what had occurred, the substance of his story being that when he and William had departed ostensibly for home they had not taken the direct road but had entered the woods northwest of town where Archibald had met them; that on approaching the spot where the body was concealed he was placed as a sentinel while his brothers took the body from the dense underbrush and drove with it in the buggy to Hickox's Mill pond, a short distance away; and that they returned after a while saying that everything was now safe. Archibald had then gone back to town and he and William had proceeded homeward.

On the day of this confession the sheriff returned with William, and Archibald was also taken into custody. Heavily manacled, the three brothers were lodged in jail, and a strong guard put over them to prevent escape or mob violence.

The story related by Henry Trailor aroused the most intense public indignation, and the murder became almost the sole topic of conversation. Business was practically suspended as searching parties and amateur detectives scoured the woods and by-ways, collecting every fragment of circumstantial evidence, and chopping down Hickox's mill dam, over the owner's earnest protest, in an effort to locate the remains of the murdered Fisher.

It was generally conceded that only a speedy trial and swift punishment could allay the clamor of the populace for the blood of the prisoners and avert the disgrace of a lynching. So, on June 18th, William Trailor was put upon his examining trial. The courtroom was packed to overflowing with excited citizens as the case was called and the witnesses sworn. The prosecution was in charge of Josiah Lamborn, Attorney General of the state, whose vigor and skill, as the General's friends pointed out, had wrung the confession from the unwilling lips of Henry Trailor, and who did not propose that this achievement should be forgotten when again he sought political office. The defendant sat between his counsel, Stephen T. Logan, leader of the Springfield Bar, with his shrewd face, piercing eyes and heavy shock of hair turning gray, and the new law partner, Abraham Lincoln.

Henry Trailor, the first witness introduced by the state, reiterated his confession and withstood unfalteringly a vigorous cross-examination.

A highly respected lady, well acquainted with the Trailors, next took the stand and testified that on the Monday afternoon of Fisher's disappearance she saw Archibald and William Trailor, with another man answering the description of Fisher, enter the timber northwest of the town, and after a while she had seen the Trailors leave the woods alone. By other witnesses it was proved that in the thicket near where the accused had entered the timber with the missing man signs of a struggle were evident, and a club had been found there with hair on it, which a doctor, after a long scientific examination, pronounced human whiskers such as Fisher wore. Through the brush and tall weeds a trail was also visible as though some heavy object had been dragged from this spot to where buggy tracks could be plainly seen in the soft earth. These tracks led to the pond at Hickox's Mill, and indicated that a vehicle had been driven into the water, turned around, and had gone back in the direction from whence it had come. It was further proved that since Fisher's disappearance Archibald Trailor had exhibited a considerable number of gold coins.

When the distinguished prosecutor, with an air of confidence and finality, rested the side of the state, it seemed impossible that any real defense could be interposed. With the direct and positive testimony of Henry Trailor, corroborated by an overwhelming array of circumstantial evidence, the guilt of the man on trial seemed established beyond any reasonable doubt.

Yet, in the face of this situation, defendant's counsel appeared serene, and in the midst of a breathless silence, Lincoln slowly arose and stated that the defense desired to introduce only a single witness. He then called to the stand a white-haired old gentleman whom many in the audience recognized as Dr. Gilmore, a physician from Warren County, and widely known as a man of high character and unimpeachable veracity.

The doctor stated that he had known Archibald Fisher for many years, and that on two occasions—one when he was building a barn, and the other while he was being treated for some chronic disease, Fisher had lived in his home. He said that several years previous Fisher had been seriously injured in the head by the bursting of a gun, and since that time had been subject to occasional aberrations of mind; that a few days earlier in the week he had returned from making a professional call and found Fisher at his home in bed and quite indisposed. Fisher told him that he had suffered a complete lapse of memory in Springfield, and, when he had recovered his senses he was near Peoria, and being closer to Warren County than Springfield, he had started home, but, feeling badly, had stopped at Dr. Gilmore's house for treatment. The doctor said that Fisher was now at his home where he would remain until he recovered sufficiently to travel.

The sensation produced by Dr. Gilmore's testimony and the dramatic turn of the case can not be described. The defendants were promptly released from custody, but the reaction of the spectators was so sudden and bitter against the Attorney General and the Mayor, who, as was apparent now, had intimidated the terror-stricken Henry into making a false confession, that it was necessary for Judge Logan to mount a table and calm the crowd by an appeal for law and order.

In a few days the officers, who had been sent to Warren County to verify Dr. Gilmore's story, returned with Fisher himself, who, apparently restored to health, and much surprised at all the furor, repeated the facts of his strange disappearance, which forever exonerated the Trailors. About this time it was also discovered that the "whiskers" on the club were cow hairs, and that the "signs of a struggle" in the thicket was where school children had attempted to hang a rope swing.

On June 19, 1841, the day after the trial, Lincoln sat down and wrote his intimate friend, Joshua Speed, at Louisville, Kentucky, in which letter he

described the effect of Gilmore's testimony on the leaders of the investigation, as follows:

"When the Doctor's story was first made public it was amusing to scan and contemplate the countenances and hear the remarks of those who had been actually in search of the dead body; some looked comical, some melancholy, and some furiously angry. Porter, who had been very active, swore he always knew the man was not dead, and that he had not stirred an inch to hunt for him; Langford, who had taken the lead in cutting down Hickox's mill dam, and wanted to hang Hickox for objecting, looked most awfully woe-begone; he seemed the victim of 'unrequited affection' as was represented in the comic almanacs we used to laugh over, and Hart, the little drayman that hauled Molly home once, said that it was too *damn* bad to have so much trouble and no hanging after all."

Early biographers have stated that Logan formed his partnership with Lincoln because of the latter's personal popularity and his already outstanding ability as a trial lawyer. However this may be, the records show that Lincoln argued as many as fourteen appeals before the Supreme Court of Illinois during the December Term of 1841, and lost only four, and at the Winter Term of 1842-3 the firm represented clients in twenty-four cases on appeal and won all but seven.

It was while Lincoln was engaged in the presentation of one of these cases in the Supreme Court that Judge John D. Caton, during a recess, asked Logan if he intended to make an argument.

"I do not think I shall trouble you," replied Logan. "I do not see it as clear as Mr. Lincoln does. I prefer to leave it to him."

"I confess," says Judge Caton, "I appreciated the compliment that he thought an intimation from him that he did not believe his associate was right would not affect my judgment, but," he adds dryly, "it happened that the cause was decided as Mr. Lincoln had argued it."

While Logan and Lincoln now and then appeared in criminal cases, actions at law seem to have constituted the great bulk of the firm's business—cases in assumpsit, slander, trespass, replevin, and appeals from the judgment of Justices of the Peace. Their chancery work was not extensive, being confined to litigation over land titles, foreclosures of mortgages and occasional suits for divorce, which Lincoln very much disliked. In the case of George Miller v. Elizabeth Miller, from Menard County, Lincoln wrote on the back of the office file: "A pitiful story of marital discord."

Fees in those days were small, and if always left to Lincoln they would have been still smaller. On February 16, 1842, the junior partner writes to a lawyer in a neighboring county: "Judge Logan and myself are doing business together now, and we are willing to attend to your cases as you propose. As to terms, we are willing to attend each case you prepare and send us for $10.00 (where there is no opposition) to be sent in advance, or you know that it is safe."

On July 14, 1842, Lincoln informs a client: "As to the fee, if you are agreed, let it be as follows—give me credit for two year's subscription to your paper and send me $5.00 in good money or the equivalent of it in our Illinois paper." And on November 11, 1842, to the same client concerning a case on appeal: "I will do my best for the 'biggest kind of a fee,' as you say, if we succeed, and nothing if we fail." And he adds as a concluding paragraph: "Nothing new here except my marrying, which to me is a matter of profound wonder."

Building at Southeast Corner of Public Square at Springfield, Ill., in Which the Firm of Logan and Lincoln Had Its Office.

It has been said that under the firm arrangement Judge Logan received the largest share of the fees. Certainly money was scarce with Lincoln during the first two years of the partnership. He and his wife had a room at the Globe Tavern, where lodging and board "only costs us $4.00 a week." Still, as he writes to his old friend Speed, he could not visit Kentucky that season. "I am so poor and make so little headway in the world that I drop back in a month of idleness as much as I gain in a year's sowing." However, in spite of his poverty he refuses to accept employment outside the scope of his profession, and drolly informs Messrs. Rowland, Smith & Company, "As to the real estate, we can not attend to it as agents, & we therefore recommend that you give the charge of it to Mr. Isaac S. Britton, a trustworthy man & one whom the Lord made on purpose for such business."

Under the guidance and tutelage of Judge Logan, Lincoln improved rapidly as a lawyer, which, however, did not diminish his interest in politics. "Now, if you should hear any one say that Lincoln don't want to go to Congress," he confided to one of his political allies, "I wish you, as a personal friend of mine, would tell him you have reason to believe he is mistaken. The truth is I would like to go very much." But a few months later the Whig delegation of Sangamon County was instructed to vote for Edward D. Baker at the District Convention, and Lincoln, being chosen as one of the delegates, half-humorously wrote again to Speed that

"in getting Baker the nomination I shall be fixed a great deal like a fellow who is made a groomsman to a man who has cut him out and is marrying his own dear 'gal.'" The ambitious young Whig, however, was spared this ordeal when the nomination unexpectedly went to J. J. Hardin. In 1844 Lincoln was again a candidate, but again Baker defeated him in the county convention and this time won the nomination and was elected.

The early autumn of 1844 found the partnership of Logan and Lincoln drawing to a close. The association had been of unmistakable benefit to the junior partner. A precision is now noted in his pleadings that is absent in the earlier documents, and his briefs show greater research and a more copious citation of authorities. His financial condition had improved sufficiently to enable him to purchase a home of his own. From Dr. Charles Dresser, the Episcopal minister who had officiated at his marriage, Lincoln bought an attractive story and a half house with green shutters and black walnut weatherboarding, painted white, located in the best residential section of the city, and paid cash for it.

Logan's son had been admitted to the bar and was coming into the office with his father. Lincoln was ambitious and eager to start a law firm of his own. And so the partnership of Logan & Lincoln was dissolved, but not the friendship, which remained warm and steadfast through the eventful, glamorous years of Lincoln's rise to fame and martyrdom, until that sad memorable day when Judge Logan rode through the crowded streets of Springfield, down past the old law office, as one of the pallbearers of the murdered President of the United States.

PORTRAIT OF A LAWYER

Sketch of John Graver Johnson, Late of the Philadelphia Bar—To Lawyers Young and Old He Was a "Towering Figure, a Veritable Legal Machine"—Details of His Remarkable Career—His Astonishing Capacity for Work, Which Enabled Him to Handle Enough Great Cases to Create a Dozen Leaders of the Bar —Personal Characteristics

By Barnie F. Winkelman
Member of the Philadelphia Bar

ON April 14, 1917, a few days before the United States declared war against Germany, John G. Johnson, listed in "Who's Who" as a "corporation lawyer," died at his home in Philadelphia. Had he wished to pass from life as unobtrusively as he had lived it, the time could not have been better chosen. The local papers were filled with the horrors of the Eddystone explosion that claimed over a hundred victims, the British were trying to smash the Hindenburg line, Bolivia had declared war against Germany, the enemy submarines were active. These things claimed the attention of a nation on the brink of war. The time for diplomacy had passed; the call was for the soldier, and lawyers throughout the country were leaving their practices and hurrying to Washington to get into service.

Nevertheless, the passing of the nation's foremost attorney was noted in the front columns of the leading papers, and the inner pages were filled with the eulogies of Bench and Bar and the stories and traditions that had gathered about him. There were articles in the magazines and in the Sunday papers, all the war excitement notwithstanding. The lawyer who throughout his life had shunned publicity, could not, even at such a time, pass unnoticed. There were the usual tributes from lawyers, judges, financiers, and men in public life. But to the country at large, the phrase "acknowledged leader of the American Bar" came as a distinct surprise; for the vast majority had never even heard his name.

In Philadelphia, where he practiced law for fifty-four years, he could walk the streets recognized only by a few of his friends and associates. Daily for many years he lunched on his bowl of crackers and milk in a chain restaurant—serving himself—a tall, lone, bulky figure that attracted no attention and stirred no curiosity. Certainly, he had escaped publicity in a remarkable degree. To those entangled in legal uncertainty—a contested will, an ugly divorce, a broken contract, an urgent injunction, a grave damage suit—his name was one to conjure with. To the average business man, a consultation with him was like a visit to the Delphic Oracle. It was a byword among lawyers that his opinion was equivalent to the ruling of a court. The captains of industry and the Titans of finance throughout the country, for whom only the best was good enough as a matter of business creed, trekked to Johnson's office when difficult legal decisions had to be made.

To lawyers, young and old, he was a towering figure, a veritable legal machine, that ground out the law as accurately and easily as Robert Jones his pars or a chess monarch his victories, without error, without strain. Only a man's co-workers, who battle against these human machines we term geniuses, can understand the awe inspired by the easy manner in which supreme genius accomplishes

hour by hour the unmatchable tasks that exhaust and balk the competing experts.

First, get the perspective. John Graver Johnson was one of the greatest lawyers that ever graced the American Bar. In fact, I know of few figures in the whole legal field that can be mentioned simultaneously with him. Outside of the law, I think of Shakespeare, of Goethe, of Voltaire, of Tolstoi; of Wagner and Beethoven; of Capablanca, Alekhine, and Lasker; of Rodin, of Michael Angelo, of Benvenuto Cellini. If this seems fulsome, let me present a few facts. He started to practice law in 1863, a few months before reaching twenty-one and being admitted formally. He practiced continuously for fifty-four years in local and state courts and in the federal courts. The late Hampton L. Carson, an admirer of Johnson, gives the figures thus: he argued fifteen hundred twenty-five cases in the Supreme Court of Pennsylvania, sixty in the Superior Court, sixteen[1] in the District Court of the United States, fifty-three in the Circuit Court of the United States, one hundred ninety-eight in the United States Circuit Court of Appeals, one hundred sixty-eight in the Supreme Court of the United States, forty-three in the Appellate Courts of other jurisdictions, including the Court of Claims, the Court of Appeals of the District of Columbia, and courts of last resort of other states. These are only cases that were appealed to the higher courts. Throughout most of his career—certainly for the first thirty years—the great bulk of his work was in the Common Pleas Courts, the examination of witnesses, the argument of rules, addresses to juries, motions for new trials, hearings before masters in divorce, and other proceedings—not included in the above. His paper books dealing chiefly with his Appellate Court work fill more than three hundred and fifty bound volumes. Keep in mind that his office staff at no time consisted of more than four or five assistant attorneys, and that most of his work was done personally. Nor does this take account of his consultations, and his written opinions which were drawn as carefully as the decrees of a court: his conferences with other attorneys, which often meant a complete examination of evidence, of law and of facts. And the hundreds of cases in which, after such conferences, the other attorneys took further action in their own names.

Try to visualize what this means simply from the viewpoint of physical and mental stamina. I think it was Oscar Straus, who, as a trial lawyer, went into court for a season, lost forty pounds, and decided thereafter that he was not fitted constitutionally for the rigors of trial work. An important case never ceases to be an ordeal for even the most practiced attorney. A short time ago, a leading criminal lawyer tried an important murder case that lasted three weeks, and then took a month off to recuperate, vowing never again to become entangled in tense human drama of this kind. Of course, with frequent cases, trial work tends to become a matter of routine; the mind threshes the grist in the legal mill without emotion. Yet an important trial or argument before the highest court with millions at stake under pitiless front page publicity is ever a tax even upon the veteran of a thousand legal battles. Besides, a lawyer can devote months of work to an important case. Brandeis spent a year of research in getting up his brief in the Oregon Minimum Wage case upon which his national reputation was based. How did Johnson try and argue case after case without a blunder—without a slip up?

For fifty years he got to his office before eight o'clock. He worked until ten; then from court room to court room until three; thereafter masters' meetings and auditors' hearings until five or six; interviews with clients until seven or eight—rendering opinion upon opinion, meeting problem after problem; an hour for dinner; back to the office until midnight to work—uninterrupted work without diversion, without let up, without distraction, for fifty-four years living and breathing the atmosphere and the problems of the law.

Such a program only a marvelous physique could withstand, and Johnson was a super-man physically with a large vigorous body, the heritage of a grandfather who was the village butcher and a father who was the village blacksmith (at Chestnut Hill near Philadelphia) and a mother who was a farmer's daughter. Nor was this the only secret of his accomplishments in the law, which has always been termed a "most jealous mistress." A further explanation can be sought in his career itself. A great mind, a vigorous body, natural talent for the law, genius that enabled him to acquire an understanding of his field by twenty—like Josef Hoffman, Marconi, Tesla, Chatterton, Keats, or Osler. This is the thing that we call genius, that enables these men to read learned treatises when their companions are reading fairy tales. Then too, the fates were very kind to Johnson. A great mind needs raw material to work upon and a reward for work well done. Johnson had both of these.

Shortly after he started to practice law, the varied and lucrative business of the Pennsylvania Company, the leading trust company of Philadelphia, was thrust upon his shoulders. His predecessor had broken under the strain. There were daily calls for opinions on intricate trust matters, foreclosures innumerable,—litigation of all kinds. At an age when most lawyers are chafing at hum-drum tasks, waiting for an occasional case, Johnson had a practice that required all his energies and made it essential for him to know every branch of the law. His practice did not arrive after his mind had become old and unreceptive and distracted by family cares. He had the stimulus too of the daily practical application of his studies, battles in court, and a certain monetary reward for real work. From this viewpoint, he was in a splendid position in comparison with genius in other fields that has accomplished great work on a long chance that it would be rewarded or even recognized.

Yet the very pressure of business which schooled him in every phase of the law would have overwhelmed a lawyer of less stature. The merely able lawyer would have had no time for research and study and no opportunity for the work in every field that Johnson did. A big practice might explain a great specialist, an insurance lawyer, a bankruptcy expert. It cannot explain this master of the law who met all experts on their own ground, and could handle any kind of case against the specialists and win. He was, in fact, consulted by the specialists of every branch of the law. These things we cannot explain. One of his associates

1. An associate of Johnson notes that this figure is low. It probably does not include many cases actually tried in this court.

described him as an elemental force of nature, the incarnation of the law itself.

Certain names come up when great lawyers are mentioned—Webster, Binney, Ingersoll, Hughes, Hamilton, Wirt, Choate, Erskine, Curran. Yet with due respect for every one of these men, comparison with the work of Johnson simply cannot be made. Lawyers whose fame rests upon a single great case, upon a few years of ordinary practice, upon political advancement, upon social distinction, upon identification with a great cause. Count up their important cases. Johnson's list of great suits was sufficient to create a dozen leaders of the Bar. Two days before he died he won the du Pont case involving over $50,000,000. He was identified with the Sugar Trust cases, the Anthracite Coal cases, litigation involving the American Tobacco Company, the Standard Oil Company, the Northern Securities merger, the Amalgamated Copper cases, numerous suits involving the Pennsylvania Railroad, the U. S. Steel Corporation, the New York Central, and so on indefinitely. He represented sixty to eighty banks and trust companies. For fifteen years it was said that no great case was argued in the United States Supreme Court without his participation in it. Two presidents asked him to sit on the Supreme Court Bench, and one invited him to become Attorney General. The tradition has grown up that the elder Morgan would not act without his opinion.

Now to get a clear picture of his task as leader of the Bar and to dispel a few popular illusions. To the laity such a lawyer becomes a miracle man under whose spell the most desperate cases can be won easily. He has but to bring the force of his genius to bear upon the problem. Hence the great flocking to the leader. Also in the background of the public mind, is the thought that he has only to walk into the court room, and opponents run to cover, judges beam upon him, and juries pay him tribute with their verdict. (With Johnson there never was a suggestion of an influence with the courts or juries other than his sheer ability.) But the popular conception is false. The leader of the Bar secures a real hearing. He has the confidence of the court. His statements are trusted. But beyond this, the lawyer who wears a crown has a hard time of it. Johnson, recognized as one of the leaders of the Philadelphia Bar at thirty, was a marked man thereafter, a target for every adversary who itched to defeat the champion in legal battle. To best Johnson was an achievement that could be retold to one's children. Nor were these opponents mediocre men. The cases he fought involved millions, and the finest legal talent was arrayed against him. There was no room in such battles for second rate men, and these near-champions made extraordinary efforts in such cases. They delved into the records and prepared for months. Johnson had to battle every case as a routine matter.

Nor are the courts over sympathetic toward the big lawyer, popular tradition to the contrary notwithstanding. The judicial instinct is to hold the scales of justice even and not to be swayed by distinguished counsel. Where all the talent is on one side, most judges will go out of their way to counteract its effect. The courts respected Johnson's ability and sincerity. But there it ended. Without leaning backward to be fair, a judge is on his guard against subtle and convincing arguments. Besides, he is himself a lawyer and quite ready to demonstrate—should eminent counsel slip up—that not all the legal learning is on the floor of the courtroom.

The average lawyer with an occasional case can rely upon a bag of tricks. He waxes indignant at his opponent. He storms that never was he so moved by the plight of his client. Johnson, battling day after day, could not indulge in any of these things. In fact, the usual practices we think of as the art of the lawyer could not be offered as a steady diet to juries and judges before whom he was working day after day. Such tactics would quickly pall and lose their effect. Johnson had a great mind. He early and wisely discarded all the usual legal fireworks, the flowing language, elocution, ornament. By nature, simple, rugged, hating pretence, he presented his cases in a direct, terse manner that stood up day after day and year after year before judges and juries.

He knew that his reputation placed a burden upon him. Juries were prepared to be swayed against their judgment; spectators who came from afar expected a great effort from this great lawyer. Johnson wanted the verdict of the jury, not empty applause. He discarded the mantle of greatness; he stumbled a bit and floundered about. At times he seemed a bit awkward—ungainly—baggy. He indulged in no rhetoric; he wanted no compliments. He used to compare himself to a waiter who was judged by the food he brought, without a hitch. So Johnson stuck to the facts; tried to resolve complex situations into their simple elements and to show that they fell within some one of the cardinal principles of law.

In this, no doubt, he took advantage of the tendency of the human mind to avoid complexities and to find refuge in simple principles. My own belief is that the courts err most frequently in doing just this. The temptation to cut through a complex chain of events and to bring them all under some simple established rule is great, particularly for the courts, burdened with a mass of work. Where such a legal principle offers a further opportunity to the court to expound a moral, to adorn a tale, or to express righteous wra*h, few can resist. Johnson took advantage of this universal frailty. Call it judicial laziness if you will; it is the same desire for classification and simplicity which divides Gaul into three parts or history into convenient periods. Practically, I doubt whether the real facts which must be passed on by the courts fall as easily into various categories, as judicial decisions imply. Nor whether in the complex battles of life, all right is on one side.

Johnson loved to cast aside the great mass of facts that were developed in the course of the case and concentrate upon a few points, and upon them base his argument. This is the real task of the lawyer—to concentrate the attention of the court upon a simple principle as against the great mass of evidence and other principles of law which might be invoked. Not always would the courts sustain Johnson. On one occasion he tried to set aside an important will on the ground that a devise to a woman until she married was against public policy —contrary to good morals. The Pennsylvania law happened to be otherwise, and the court in its opinion took a special delight in citing authorities with-

out number from every jurisdiction showing that Mr. Johnson's argument was unsound.

Appearing every day before the courts has its own problems for the lawyer. Johnson was arguing an important case on one occasion when he was interrupted by a remark from the Bench. "Isn't this, Mr. Johnson, exactly the reverse of the proposition you so ably argued before us last week?" But Johnson was not to be stumped. Quick as a flash he replied, "Yes, your Honor, but I can't be wrong in both cases."[2]

His training had been thorough. At the age of twelve, he had entered the Central High School of Philadelphia, graduating second in a class of one hundred and fourteen, his classmates all boys of the best families of Philadelphia and on the average two years older than himself. He entered the office of Benjamin Rush, a noted lawyer, and continued to study law under him and his brother, J. Murray Rush, and his associate, William F. Judson. He attended lectures at the University of Pennsylvania, took part in the Gettysburg campaign for a brief period, and then back to the law until his death. No case was too small or too large for him to handle: this was his policy to the end of his days. His memory was phenomenal. He could recall practically every case he had tried or in which he had rendered an opinion. His judgment of human nature was uncanny. He read his judges like a text book of law, and changed his tactics and arguments accordingly. Thorough preparation, accurate and forceful presentation of his cases, aggressive cross-examination were his chief weapons.

He married comparatively late in life, a wealthy and attractive woman through whom the most exclusive social circles were open to him; but he was not to be distracted from his career. His own attitude toward his work was simple. "I am nothing, but a hard working lawyer," he said, "I have been nothing, seen nothing, done nothing of more than passing interest. Why should the public want to know anything about me? There is nothing to tell." He gave no interviews. The only photographs of him were snapped when he was walking.[3] He disliked all ostentation. In 1915, when he received an honorary degree from the University of Pennsylvania, he fidgeted uneasily on the platform while he was being eulogized by the provost.

There was no equivocation about him. His cable to a group of business men who had requested his advice: "Combination possible; jail certain," is typical of his opinions. In a most important case his entire argument before the Supreme Court of the United States lasted fifteen minutes. Until comparatively late in his career, he never belonged to a club—he seldom attended public dinners.

He practiced law in the belief that every man was entitled to his day in court, and once he had taken a case, no matter what was involved or how small his fee, he battled it to the end. On many occasions he scaled down the fees that were offered him where he did not think his work justified the higher fee. He realized that in many cases he was the miracle man, the forlorn hope, where other legal talent had failed. But he battled even such cases with the same vigor and determination.

His reputation in Europe was even greater than at home. Chief Baron Pallis, noted Irish jurist, visiting this country, stated that the man he was most anxious to meet in the whole United States was Johnson, the greatest lawyer in the English-speaking world.

After the death of his wife in 1908, he spent much of his time collecting his magnificent group of paintings. His unrivaled collection, which is now housed in his former home on South Broad Street, is his gift to Philadelphia. His Hals, Van Dycks, Corots, Rembrandts, Millets, and so on through the finest of the French, Dutch and Italian masters are priceless. To the end of his days, the door of his private office was never closed. He had a great capacity for friendship without sentiment. It was difficult to win his confidence, but once gained, he would go to any length for a friend. Other honors came to him, but he kept plodding along with the law. In the last year of his life, he participated in ten cases in the United States Supreme Court, nine in the lower federal courts, twenty in the Pennsylvania Supreme Court and four in the Superior Court, outside of consultation and other work. Certainly a tremendous task for a man of seventy-six. He died in harness a few days after arguing one of his most important cases. Death came while he was sleeping in the early hours of Saturday, April 14. He had been at his office all day on Thursday. All the moneys he had received for fifty-four years' work as a lawyer went back to the citizens of Philadelphia in the gift of all his art treasures to them.

Viewed in retrospect, his was an extraordinary career. As Mr. Carson writes, "He owed nothing to early advantages of birth, fortune, or family influence. He held no office, he wrote no judicial opinions, he delivered no public addresses, he published no books." Yet as a great fighting lawyer he battled day in and day out in court for fifty-four years without let-up, handling cases that in number and importance have never been equalled by any other attorney, living or dead. As the embodiment of all the qualities that the legal profession admires and respects, it will be a long time before any other man will combine the thousand necessary ingredients to produce such a dynamic exponent of the law. The term, "Philadelphia lawyer," had been world-wide in the eighteenth and early nineteenth centuries due to Johnson's predecessors who spread their fame throughout the world. Johnson carried on the tradition for another fifty years.

2. This story, oft repeated, may be apocryphal. It epitomizes the popular conception of the great advocate, rather than the man himself. For there was no sophistry in his methods either in his consultations or in his court-room work.

3. Several photographs were taken of Mr. Johnson a few years prior to his death, with the understanding that they would not be released until after he died.

AMERICAN BAR ASSOCIATION JOVRNAL

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COMPETITION BETWEEN STATES AND NATION

A new and disastrous form of competition, unrelated to the anti-trust act, has arisen to create one of the most pressing problems of our time. It is the tax competition between the Nation and the States, each side clutching "at every available straw of revenue," with a growing disregard of the fact that the contest leads to duplication of tax burdens and a growing confusion in the whole field of taxation.

The Association of American Legislators has taken the first step toward halting this frenzied rush on the same tax sources by both Federal and State Governments. It has called an Interstate Conference of Legislators to meet at Washington on February 3 and 4 to consider the problem of conflicting taxation. It hopes to aid in delimiting the proper fields for Federal and State taxation and thus help to remove a growing cause of conflict between State and Nation.

The call for the conference has the endorsement of President-elect Roosevelt, many other leaders of public life, and a number of the responsible newspapers of the country. As officially stated in the February issue of "State Government," official organ of the American Legislators' Association, the immediate purpose of the gathering is "to consider the advisability of establishing a standing committee of legislators —with an advisory board of fiscal officials— to study the problems of conflicting taxation, and to confer concerning them. It will be the duty of this committee, if established, to negotiate with the appropriate congressional committees and to report its findings and recommendations at a subsequent meeting of the Interstate Conference of Legislators."

The questions which such a committee would be likely to consider at the outset, we are told, are: first, what would be the most practical and the most satisfactory formula for the exclusive allocation of revenue sources, assuming that it is decided that it would be desirable to set aside certain sources of revenue for the exclusive use of the States and certain others for the Federal Government? Second, whenever both Federal and State Governments are to levy taxes upon a specific source, is it feasible to arrive at a formula for a division of the proceeds from that source? Third, if any specific source of revenue is to be taxed by both Federal and State Governments, will it be feasible to have a joint administration and thus collect only one tax? Fourth, where such joint administration and collection of a single consolidated tax is not feasible, to what extent can the Federal and State Governments cooperate in collecting their two sets of taxes?

The circumstances which caused the conference to be called are forcefully set forth. There is a large amount of overlapping Federal and State taxation. Until recently most of the States gave the Federal Government a clear field in the taxation of income. Now twenty states impose such taxes and the legislatures of most of the others are thinking of doing it at their next session. Until recently the States had a clear field for inheritance taxation. "Then Florida disturbed the equilibrium and Congress invaded the field." Every State in the Union has a gasoline tax, and it has been so successful that "the Federal Government has now broken over the Tenth Commandment." Today when the cigarette smoker puts ten pennies upon the counter for a package of cigarettes, six of them go to the Federal Government, and thirteen States are already collecting tobacco taxes in addition, while several more are on the point of doing so. Already nine States have general sales taxes and Congress is continually toying with the same device.

The plan which those who called the conference have in mind contemplates, as the first step, "the development of a sort of semi-official formula prescribing the limits within which the taxing governments should confine their money-raising operations," which formula should represent a consensus of opinion arrived at (as far as possible) by

Congress and by the States jointly. The next step will be "to crystallize public opinion to induce Congress and each State Legislature to keep its program of taxation within the bounds thus described."

The plan, it may be added, has some very practical and promising features. For instance, it contemplates the study of the problem by representatives of those who are to pass on the question in the halls of legislation. The conclusions will thus be those of inside and not outside experts, of whom legislators are generally suspicious and in whose work they can seldom be induced to take a real interest. It is a project for cooperation with Congress, which is considering the same problem through a Sub-Committee on Double Taxation, and not a plan to antagonize that body.

The work which the coming conference hopes to initiate and eventually carry to a successful conclusion is not directly connected with any of the drives for a cessation of governmental extravagance. But by calling attention to the burdens which both State and Nation are piling up on the same revenue sources, it cannot fail to lend powerful, if indirect, aid to demand for governmental economy.

LAWYERS IN PUBLIC OFFICE

Editorial comment has heretofore been made in these columns on the pioneering work, not as to the ethical principles involved but as to the application of those principles to a novel state of facts, which has been done by the Chicago Bar Association in its proceedings against certain lawyers employed by the Sanitary District of Chicago during the period between July 1, 1925, and December 31, 1928.

The information against the respondents was filed by the Chicago Bar Association by leave of the Supreme Court of Illinois in 1930, and it charged them with malfeasance in office as members of the Bar of that Court. The malfeasance charged in the case of most of the respondents consisted in taking salaries from the District without rendering adequate services therefor.

The Supreme Court referred the matter to a Master to take proof and report his conclusions of law and fact. It has now acted on that report. The decision, which was handed down by Mr. Justice Stone, is a lengthy one and goes into the cases of the respondents separately, and imposes discipline in a large majority of them. It is an emphatic assertion of the duty of a lawyer in public office to treat his client, the public, as honestly and fairly as he is expected to treat a private client. No matter what the political traditions of the way of doing business may be, his professional obligations remain and must control in any professional connection, public or private.

NEW MEMBER OF THE BOARD OF EDITORS

Mr. Charles P. Megan of Chicago has been elected a member of the Board of Editors of the JOURNAL to fill the vacancy caused by the recent death of Mr. Horace K. Tenney.

The new member hardly needs an introduction to the readers of the JOURNAL. His conduct of the Department of Book Reviews in each issue has made him generally known. It may be added that it has contributed greatly to whatever success the JOURNAL may have attained.

He is at present the President of the Chicago Bar Association—a fact which sufficiently attests his standing with his professional brethren in the city in which he lives. And it may be of interest to know that when his first term in that position expired, a familiar precedent was broken in order to have him serve a second term and thus carry to completion certain very important work which had been undertaken during his first administration.

Mr. Megan is also Chairman of the Publications Committee of the American Bar Association and a member of the Board of Bar Examiners of Illinois.

CORRECTION

In the article on "Consent Receiverships in the Federal Courts" in the January, 1933, issue of the JOURNAL the first sentence in the second paragraph of Division IV should be corrected to read as follows:

"It should be noted that the bankruptcy courts are not open to an involuntary petition against a solvent company and in order to be deemed insolvent the company's property must at a 'fair valuation' be insufficient in amount to pay its debts, and the officers of a solvent company hesitate to invoke the aid of bankruptcy because of the accompanying odium."

The second sentence in the last paragraph of the article should read:

"A solvent company can file a voluntary petition in bankruptcy."

Attention was called to these corrections by the author but too late to make them in the January issue, which had already been printed and partly mailed.

REVIEW OF RECENT SUPREME COURT DECISIONS

Fraudulent Conveyance and Receivership to Hinder and Delay Creditors—Landowners Who Have Paid Special Assessments for Benefits Accruing from Dedication of Nearby Lands as a Park Have No Vested Right in the Use Thereof as a Park and Cannot Enjoin a Change in Such Use—Where Federal Court Has Issued a Temporary Injunction Against State Commission's Order Restricting Oil Production, the Governor Cannot Impose Same Restriction by Executive Order under Proclamation of Martial Law—Statute Regulating Contracts for Sale of Agricultural Machinery Held Valid—Texas Statute Regulating Common and Private Motor Vehicle Carriers Sustained.

By Edgar Bronson Tolman*

Receivers—Fraudulent Conveyances

Where a debtor is unable to pay his debts as they mature, and organizes a corporation for the purpose of conveying all of his property to it and having it assume his obligations, in order that the property may be placed in the hands of a receiver to carry on the business until it can be restored to a sound financial condition, such conveyance and receivership are fraudulent in law, as devices to hinder and delay creditors, although there is no intention on the part of the debtor actually to defraud his creditors.

A creditor in such case is entitled to have his debts paid by the receiver or to have leave to levy execution on the debtor's property in the hands of the receiver.

Shapiro v. Wilgus, Adv. Op. 149; Sup. Ct. Rep., Vol. 53, p. 142.

This case was before the Court on certiorari to review a judgment of a circuit court of appeals which had sustained a decree of a district court denying leave to levy on property in the hands of a receiver. The petitioner was a judgment creditor of one Robinson.

It appeared that Robinson was a lumber dealer who had become unable to pay his debts as they matured. He thought that he would be able to pay later and to preserve a surplus if his property could be placed in the hands of a receiver. The Pennsylvania law does not permit receivership in the case of an individual, and accordingly, Robinson, finding that two of his creditors were unwilling to give him time to pay, organized a Delaware corporation under the name of Miller Robinson Company and conveyed all of his property to it in return for substantially all of the stock and the grantee's assumption of his obligations. Three days later he and a simple contract creditor obtained the appointment of receivers in the federal court, invoking diversity of citizenship as the basis of jurisdiction.

The petitioner obtained his judgment thereafter, in a state court, and petitioned the district court for leave to levy on the corporation's property in the hands of the receivers, alleging that the conveyance and receivership were parts of a scheme to hinder and delay creditors. Such leave was denied by the district court, and the ruling was sustained in the circuit court of appeals. On certiorari this was reversed by the Supreme Court in an opinion by Mr. Justice Cardozo.

In thus deciding the case of the Court pointed out that, although there was no intent in the transactions to defraud creditors, the intent to hinder and delay them was enough to impress upon the conveyance the stamp of illegality.

> The conveyance and the receivership are fraudulent in law as against non-assenting creditors. They have the unity of a common plan, each stage of the transaction drawing color and significance from the quality of the other; but, for convenience, they will be considered in order of time as if they stood apart. The sole purpose of the conveyance was to divest the debtor of his title and put it in such a form and place that levies would be averted. The petition to issue execution and the answer by the receivers leave the purpose hardly doubtful. Whatever fragment of doubt might otherwise be left is dispelled by the admissions of counsel on the argument before us. One cannot read the opinion of the Court of Appeals without seeing very clearly that like admissions must have been made upon the argument there. After a recital of the facts the court stated in substance that the aim of the debtor was to prevent the disruption of the business at the suit of hostile creditors and to cause the assets to be nursed for the benefit of all concerned. Perceiving that aim and indeed even declaring it, the court did not condemn it, but found it fair and lawful. In this approval of a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth (13 Eliz., ch. 5), there is a misconception of the privileges and liberties vouchsafed to an embarrassed debtor. A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them. Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather a financial storm, and pay his debts in full. . . The belief, even though well founded, does not clothe him with a privilege to build up obstructions that will hold his creditors at bay.

Since the conveyance to the corporation was found to be fraudulent in law, the receivership was found to rest on the same footing.

> The end and aim of this receivership was not to administer the assets of a corporation legitimately conceived for a normal business purpose and functioning or designed to function according to normal business methods. What was in view was very different. A corporation created three days before the suit for the very purpose of being sued was to be interposed between its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers. We do not need to determine what remedies are available for the conservation

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of the assets when a corporation has been brought into existence to serve legitimate and normal ends.

The Court, although noting the fact that receivers are at times, and under exceptional circumstances, appointed at the suit of simple contract creditors, stated that generally the remedy is open only to judgment creditors. The impropriety of appointing receivers under the circumstances disclosed here was emphasized.

> We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. . . Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality. It is one thing for a creditor with claims against a corporation that is legitimately his debtor to invoke the aid of equity to conserve the common fund for the benefit of himself and of the creditors at large. . . Whatever hindrance and delay of suitors is involved in such a remedy may then be incidental and subsidiary. It is another thing for a debtor, co-operating with friendly creditors, to bring the corporation into being with the hindrance and delay of suitors the very aim of its existence. The power to intervene before the legal remedy is exhausted is misused when it is exercised in aid of such a purpose. Only exemplary motives and scrupulous good faith will wake it into action.
>
> The receivership decree assailed upon this record does not answer to that test. We have no thought in so holding to impute to counsel for the debtor or even to his client a willingness to participate in conduct known to be fraudulent. The candor with which the plan has been unfolded goes far to satisfy us, without more, that they acted in the genuine belief that what they planned was fair and lawful. Genuine the belief was, but mistaken it was also. Conduct and purpose have a quality imprinted on them by the law.

In conclusion the Court adverted to a question of procedure, stating that if there had been any substantial doubt whether the conveyance and receivership were voidable, the federal court might have refused to yield up its jurisdiction. Since there was no substantial doubt, it was held that the federal court should either have ordered the receivers to pay the petitioner's debt or granted leave to issue execution.

The case was argued by Mr. Jacob Weinstein for the petitioner, and by Mr. Sidney E. Smith for the respondents.

Eminent Domain—Discontinuance of Public Use for Which Land Was Acquired in Fee—Right of Adjoining Land Owners

Landowners who have paid special assessments on their lands, in consideration of special benefits accruing by reason of the dedication of nearby lands as a public park, have no vested right in the use thereof as a public park, and are not entitled to enjoin a change in the use, when the park lands were acquired in fee by purchase or condemnation.

A declaration by the government that the lands devoted to park purposes shall be perpetually dedicated as a public park constitutes but a declaration of public policy which may later yield to another policy, and does not give to adjoining owners the right to compel the continuance of the park use in perpetuity.

Reichelderfer, et al. v. Quinn, et al., Adv. Op. 176; Sup. St. Rep., Vol. 53, p. 177.

This case involved the review of an injunction granted by the Supreme Court of the District of Columbia, enjoining the Commissioners of the District from erecting a fire engine house in Rock Creek Park. The respondents, owners of property near and adjoining the site of the proposed engine house, contended that the contemplated use of the land would violate their right to have the land used for park purposes, and that the direction of Congress to use it for other purposes constituted a taking of their property without just compensation, in violation of the Fifth Amendment.

The asserted right to have the park use continue was said to have its source in the proceedings whereby the land was acquired. Under the statute the lands taken by purchase or condemnation, were "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States . . .", and surrounding lands, including lands of the respondents, were assessed to the extent that they were "specially benefited by reason of the location and improvement" of the park. These two provisions of the statute were regarded by the trial court as the generating source of the rights asserted by the respondents. The District Court of Appeals affirmed the decree, but on certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE STONE.

In stating the reasons for reversal, the Court first pointed out that the statute contemplated that the lands should be acquired "in fee," so that the use might subsequently be changed.

> The respondents derived no rights against the government from the dedication of the park alone. The park lands purchased or condemned by authority of the Rock Creek Park Act were vested in the United States in fee. Section 3 of the Act twice declares that "the title" and once that "the fee" of the condemned lands shall vest in the United States. By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses. The dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years.
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> The case of a park is not unique as the court below seems to have thought. . . It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use . . . (citing cases), or to make other disposition of the land. . . The abutting owner cannot complain; the damage suffered by him "though greater in degree than that of the rest of the public, is the same in kind."

Consideration of the case from the aspect of the second contention urged by the respondents led to no different conclusion. In that contention the position of the respondents was that the payment of assessments on their lands, on account of special benefits accruing by reason of the improvements, entitled them to enjoy the benefits in perpetuity.

> We may assume that the landowners acquired rights commensurate with the assessments authorized. But the statute does not purport to place restrictions on the park lands in their favor, and the decision of this Court sustaining the constitutionality of the assessment provisions . . . gives no hint that among the benefits for which they were required to pay was a right against the government to have the lands forever used as a park.
>
> All that the statute says is that the lands acquired shall be perpetually dedicated as a park for the enjoyment of the people of the United States and that benefits shall be assessed (sec. 6). Statutes said to restrict the power of government by the creation of private rights are, like other

public grants, to be strictly construed for the protection of the public interest. . . Thus construed, the dedication of the park, a declaration of a present purpose, does not imply a promise to neighboring land-owners that the park would be continued in perpetuity. . . The benefit of a governmental obligation which the statute neither expresses nor implies obviously was not to be assessed.

The possibility that the use for park purposes might be abandoned for another use was said to be a factor to be considered when the benefits were assessed.

The case was argued by Mr. Robert E. Lynch for the petitioners and by Mr. George E. Sullivan for the respondents.

Constitutional Law — Judicial Determination of Property Rights—Executive Interference Through Military Force

A producer of oil from oil wells has a right to judicial determination by a federal court as to the validity of an order of a state commission restricting the amount of oil which may be produced from the wells. Where the federal court has issued a temporary injunction against enforcement of the commission's order, the governor of the state is without power to impose the same restriction by executive order, under a proclamation that a state of insurrection exists and a declaration of martial law over the territory in which the oil wells are located. Such action offends against the due process clause of the Fourteenth Amendment.

Sterling, et al. v. Constantin, et al., Adv. Op. ——; Sup Ct. Rep., Vol. 53, p. 190.

In this case the Court affirmed a judgment of a specially constituted district court enjoining the Governor of Texas, the Adjutant General and the Brigadier General of the National Guard from enforcing their military or executive orders restricting the production of oil from the complainants' oil wells.

The complainants sued originally, on October 13, 1931, members of the Texas Railroad Commission, the State's Attorney General, and Brigadier General Wolters and others to restrain the enforcement of orders of the Commission limiting the production of oil from the complainants' leaseholds. On October 28, 1931, a temporary injunction was issued restraining the defendants from limiting production below 5,000 barrels per well. The commission then ceased its attempt to enforce the orders.

Previously, in August, 1931, the Governor had issued a proclamation stating that certain counties, in which the complainants' wells were located, were in "a state of insurrection, turmult, riot, and a breach of the peace," and declaring "martial law" in that territory. The Governor directed Brigadier General Wolters to assume supreme command of the situation, and to take steps necessary in order "to enforce and uphold the majesty of the law," subject to the Governor's orders.

When the district court had entered its injunction as to the commission's restrictive orders the Governor issued oral and written orders limiting oil production to 165 barrels per well per day, the same limit as that fixed in the enjoined orders. Later he reduced the limit to 150 barrels, and then to 125 barrels, and finally to 100 barrels. In November the complainants by amended bill attacked the executive orders, alleging that the courts in the territory were open and functioning, that no armed bodies of civilians were in the territory, and that no bodies of men were threatening bloodshed, violence, or destruction, but that, on the contrary the citizens of the territory were in a peaceable condition amenable to process. The defendants, in answer, set up the executive proclamation and orders, the declaration of martial law, and asserted the validity of the acts assailed. By supplemental bill, in response to the answer, the complainants denied that the Governor, under the state law and constitution, could lawfully exercise the authority he had assumed, and alleged that if any state law authorized his action it was contrary to specified provisions of the state constitution and in contravention of the due process and equal protection clauses of the Fourteenth Amendment.

The district court received evidence submitted by both parties and found, among other things, that the Legislature had passed an amended oil conservation act in August, 1931; that the Governor in his proclamation of August 16, 1931, recited provisions of the constitution and statutes for the conservation of oil, the existence of an organized group of producers in the East Texas oil fields who were said to be in a state of insurrection against such laws; that their reckless production was creating enormous physical waste; that this condition had brought about such a state of public feeling that if the state government was unable to protect the public's interest they would take the law into their own hands; that a state of "insurrection, tumult, riot and breach of the peace existed" threatening danger to citizens and property in the defined area and elsewhere; that it was necessary to stop the "reckless and illegal exploitation" until the resources could be properly conserved and developed under protection of the civil authorities. Troops were then called out and the wells shut down. In September, after the Commission had made its order, although the proclamation of martial law had not been rescinded, the military occupation in force ended, but not all troops were withdrawn. Production then took place under the Commission's orders. After the district court entered its restraining order against the Commission the Governor and General Wolters determined not to brook court interference with restricted production and proceeded upon the real, though mistaken, belief that the court had no jurisdiction over them while the proclamation of a state of war was in effect.

As to actual conditions, the district court found that neither the civil authorities nor the courts had been interfered with save by the refusal of Wolters to obey the injunction, and that neither a state of war nor a condition "constituting, or even remotely resembling war" existed. That court held that the Governor had acted beyond his authority under the state law and constitution.

On appeal, the final judgment was affirmed by the Supreme Court, in an opinion by the CHIEF JUSTICE. In affirming the judgment the Court rested its de-

cision on federal grounds rather than upon the state law. The appellants' contentions were thus set forth:

(1) that the Governor has power to declare martial law; (2) that courts may not review the sufficiency of facts upon which martial law is declared; (3) that courts may not control by injunction the means of enforcing martial law; and (4) that the finding of the Governor of necessity to take property is due process of law.

In dealing with the questions raised the grounds in support of the district court's jurisdiction were stated.

The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. . . The Governor of the State, in this respect, is in no different position from that of other state officials. . . Nor does the fact that it may appear that the state officer in such a case, while acting under the color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. . .

As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. . . The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case.

In analysis of the situation the effect of the Governor's orders on the complainants' right to have the legality of the Commission's orders judicially determined was thus described.

The State, in this instance, had asserted its regulatory authority by enacting laws for the prevention of waste and had empowered the Railroad Commission to investigate and to establish rules to this end. The Commission then made its orders governing and limiting oil production. The complainants brought suit in the Federal court to restrain the enforcement of these orders upon the ground that they were unauthorized, arbitrary and capricious, and violated the Federal right to the enjoyment and use of the properties. Exercising the jurisdiction conferred by Federal statute, a Federal Judge had granted a temporary restraining order, pending the convening of the court which by that statute was charged with the duty to determine whether the requirement of the Commission was valid or its enforcement should be enjoined. While this orderly process was going forward, it was superseded and in effect nullified by the Governor of the State who undertook by military order to effect the limitation which the Commission by that process was for the time being forbidden to maintain. And when the Federal court, finding his action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. III, sec. 2) and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right.

The Court took care to point out the wide range of discretion vested in the state and the Governor in determining the means to be adopted for the suppression of insurrection and disorder. That range of discretion, however, is not broad enough to justify every action which the authorities may take.

It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

The question here was not, said the Court, as to the power of the Governor to proclaim the existence of a state of insurrection and the necessity for the use of military force, but rather the power of the Governor to regulate oil production by executive order.

The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. In the place of judicial procedure, available in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal. In particular, to the process of the Federal court actually and properly engaged in examining and protecting an asserted Federal right, the Governor interposed the obstruction of his will, subverting the Federal authority. The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court.

In conclusion, the Court referred to the contention of the appellants that, although the courts may call the Governor to account after the emergency has passed, they may not enter an injunction against him. This was said to confuse judicial power with judicial remedy.

In the present case, the findings of fact made by the District Court are fully supported by the evidence. They leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful. Complainants had a constitutional right to resort to the Federal court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring the military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared. It is also plain that there was no adequate remedy at law for the redress of the injury and, as the evidence showed that the Governor's orders were an invasion under color of state law of

rights secured by the Federal Constitution, the District Court did not err in granting the injunction.

State Statutes—Validity of Statute Regulating Contracts for Sale of Agricultural Machinery

The statute of North Dakota, providing that the purchaser of certain agricultural machinery shall have a reasonable time after delivery to inspect and test the machinery to determine its fitness for the purpose for which it was purchased and declaring any contractual provision to the contrary to be against public policy and void, is a valid exercise of the police power of the state, to protect farmers from the loss of their investments in the machinery and to guard against crop losses likely to result from reliance on such machines.

Advance-Rumely Thresher Co. v. Jackson, Adv. Op. 192; Sup. Ct. Rep., Vol. 53, p. 133.

This case came before the Court on appeal from the Supreme Court of North Dakota, which had sustained the validity of a statute of that State relative to the sale of tractors and harvesting machinery. The statute, enacted in 1919, provides that any person, firm or corporation purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after for delivery for inspection and testing of the same, and that if it does not prove reasonably fit for the intended purpose the purchaser may rescind the sale by notice within a reasonable time after delivery. It is also declared that any provision in any contract contrary to the foregoing requirements is against public policy and void.

The appellant in this case sold and delivered to the appellee a harvester-combine for cutting and threshing his grain in a single operation. The appellee found it unfit for the purpose and accordingly rescinded the sale in the manner provided in the act, and demanded the return for cancellation of notes aggregating $1,360, which he had given in consideration of the machine. On the appellant's refusal to return the notes the appellee sued to recover possession of them. The appellant answered, asserting the invalidity of the statute under the due process and equal protection clauses of the Fourteenth Amendment and that the purchaser had waived all warranties, express, implied or statutory. On demurrer the appellee had judgment in the state courts, and their ruling was sustained by the Supreme Court in an opinion by Mr. Justice Butler.

At the outset attention was called to a provision of the Uniform Sales Act, in force in North Dakota, which, on the facts disclosed, would imply a warranty that the machine was reasonably fit to cut and thresh grain in a single operation. That act left the plaintiff free to waive the implied warranty.

Referring to the rule that parties generally are free to contract and that valid restraint is the exception, MR. JUSTICE BUTLER stated the object of the challenged legislation:

> The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the State in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. . . In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. . .
>
> The object sought to be attained by the statute under consideration is to protect farmers in an agricultural State against losses from investments in important machines that are not fit for the purposes for which they are purchased and to guard against crop losses likely to result from reliance upon such machines.

The wide use of farm machinery in North Dakota, the inability of farmers as a class to determine the fitness of machinery without actual test, the serious losses from failure which might result if the machines should be relied on generally in that state, and other factors were noted to show the need for the legislation. In view of these, the regulation and classification were held valid, notwithstanding the due process and equal protection clauses.

> The regulation imposed seems well calculated to effect the purposes sought to be attained. The evils aimed at do not necessarily result from misrepresentation or any fraud on the part of sellers, and at least one of the purposes of the legislation is to lessen losses resulting from purchasers' lack of capacity, without opportunity for inspection and trial, to decide whether the machines are suitable. . . There is nothing in this case to suggest that, under the guise of permissible regulation, the State unreasonably deprives sellers of such machines of their right freely to contract or that in its practical operation the statute arbitrarily burdens their business. . . The State, in order to ameliorate the evils found incident to waivers of implied warranties of fitness, merely declares that such agreements in respect of the sale of the designated machines are contrary to public policy and holds the parties to the just and reasonable rule prescribed by Sec. 15 (1) of the Sales Act. Upon the question of due process more need not be said.
>
> The character of the machines, the need of tests to determine their fitness, the serious losses that ensue if in actual use they prove unfit and the other considerations alluded to plainly warrant the classification and special regulation of sales prescribed by the statute.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurred in the result.

The case was argued by Mr. Howard G. Fuller for the appellant, and by Mr. William Lemke for the appellee.

Constitutional Law—State Statutes—Motor Truck Transportation

The Texas statute containing provisions applicable both to common and private or contract carriers by motor vehicles operating over state highways, and requiring contract carriers to obtain permits as a prerequisite to their use of the highways, which permits are granted by the state railroad commission only when the proposed operation will not impair efficient public service by any common carrier adequately serving the same territory, and empowering the commission to prescribe minimum rates for private carriers which shall not be less than rates prescribed for common carriers for similar service, is valid as a regulatory measure for the preservation and safety of state highways.

Stephenson, et al. v. Binford, et al., Adv. Op. 203; Sup. Ct. Rep., Vol. 53, p. 181.

In this opinion, by MR. JUSTICE SUTHERLAND, the Court upheld the validity of a Texas statute relating

to the use of the highways of that State by motor carriers. The statute contains provisions as to both private and common carriers by motor vehicles. The latter are required to obtain certificates of public convenience and necessity, while contract carriers are required to obtain permits to operate over state highways. The Railroad Commission of Texas is vested with authority to supervise and regulate the transportation of property for hire by motor vehicle on any public highway; to fix maximum or minimum or maximum and minimum rates in accordance with specific provisions of the act; to prescribe regulations for the government of motor carriers, for the safety of motor carriers, for the safety of their operations, and for other purposes; and to require each driver to have a license issued on examination as to his ability and fitness. Broad powers are conferred on the commission to supervise and regulate the relationship of motor carriers and the shipping public, in the public interest; and generally to regulate and supervise such carriers,

> "so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public."

The permits prescribed for contract carriers as a prerequisite to operation on the highways are not to be granted if the commission is of the opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory."

Section 6 (d) of the act authorizes the railroad commission to issue special permits to persons desiring to transport for hire over the highways livestock, mohair, wool, milk, and certain other commodities, under regulations and conditions deemed proper for protection of the highways and for the safety of the traveling public. Section 6aa empowers the commission to prescribe regulations governing the operation of contract carriers in competition with common carriers and to prescribe regulations governing the operation of contract carriers in competition with common carriers and to prescribe minimum rates to be collected by such contract carriers "which shall not be less than the rates for common carriers for substantially the same service."

Section 6bb excludes contract carriers from operating as common carriers and common carriers from operating as contract carriers.

Under Section 13 all motor carriers are required to give bonds and insurance policies which provide, among other things, that the obligor will pay judgments recovered against the motor carriers based on claims for loss or damages for personal injuries, or "loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carrier." The section also directs the commission not to require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by the carrier.

Section 22 (b) declares the policy of the State, declaring that the business of operating as a motor carrier of property for hire on the state highways is one affected with a public interest. It also declares that the rapid increase of motor traffic and lack of effective regulation have increased the dangers on highways and made imperative more stringent regulation to render the highways safer for public use, to reduce wear and tear on them, to eliminate discrimination in rates, to minimize traffic congestion, to restrict the use of highways for transporting property for hire to the extent required by the necessities of the general public, and to adjust and correlate the transportation agencies of the state "so that public highways may serve the best interest of the general public."

The suit under review was brought by contract carriers to enjoin the enforcement of certain provisions of the statute. The case was heard on pleadings and affidavits, before a district court, specially constituted. That court denied an interlocutory injunction, and on final hearing entered a decree denying a permanent injunction. On appeal the decree was affirmed, and the validity of the challenged provisions was thus sustained.

The appellants attacked the statute upon the following grounds: (1) That the statute in effect converts private carriers into common carriers by legislative fiat; (2) That their business is not affected with a public interest, and the provisions of the act affecting them upon that basis deprive them of property without due process of law, and abrogate their right of private contract; (3) That the statute denies to them the equal protection of the laws, by requiring them to obtain permits to operate on the highways, which permits are in the nature of certificates of public convenience and necessity, subjecting them to regulations which are not imposed on other private carriers similarly situated; (4) That other regulations applicable to them are not made applicable to persons using the highways for transportation of their own commodities under similar conditions, and so denying to the appellants the equal protection of the laws.

The Court, finding that the statute was valid as a measure regulating the use of the highways, made no ruling on the question whether the business of the appellants is affected with a public interest by reason of their use of the highways. Referring to the principle upon which the act is valid as a regulation of public highways, MR. JUSTICE SUTHERLAND said:

> It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

The appellants' contention that the act attempts to convert private carriers into common carriers was rejected as without support in the statutory provisions.

> We are of opinion that neither by specific provision or provisions, nor by the statute considered as a whole, is there an attempt to convert private contract carriers by motor into common carriers. Certainly, the statute does not say so. Common carriers by motor and private contract carriers are classified separately and subjected to distinctly separate provisions. By §1 (h), the contract carrier is defined as "any motor carrier . . . transporting property for compensation or hire over any highway in this state *other than as a common carrier.*" It is difficult to see how the legislature could more clearly have evinced an intention to avoid an attempt to convert the contract carrier into a common carrier. It is true that the regulations imposed upon two classes are in some instances similar if not identical; but they are imposed upon each class consid-

ered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier, may not also be appropriate to the business of a contract carrier.

In this connection the Court reviewed *Michigan Commission v. Duke*, 266 U. S. 570; *Buck v. Kuykendall*, 267 U. S. 307; *Bush Co. v. Maloy*, 267 U. S. 317; *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 592, and *Smith v. Cahoon*, 283 U. S. 553, relied upon by the appellants, and pointed out vital distinctions which make those cases inapplicable here.

The Court then referred to findings of the district court relating to the use and condition of the highways which were deemed sufficient to establish that the act bears a reasonable relation to the legislative purpose of removing or ameliorating the burden on the highways.

> These and other findings and the evidence contained in the record conclusively show that during recent years the unregulated use of the highways of the state by a vast and constantly growing number of private contract carriers has had the effect of greatly decreasing the freight which would be carried by railroads within the state, and, in consequence, adding to the burden upon the highways. Certainly, the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the state legislative power. And that this was one of the chief ends sought to be accomplished by the provisions in question, the record amply establishes.
>
> The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.

The requirements of the act as to permits and minimum rates, because of their relation to the general question of competition between railroad and highway transportation, are of special interest. Sustaining these provisions also as bearing a reasonable relation to the legislative object, the Court said:

> Turning our attention then to the provision for permits, it is to be observed that the requirement is not that the private contract carrier shall obtain a certificate of public convenience and necessity, but that he shall obtain a permit, the issue of which is made dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired. Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong. . . Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment. . . Leaving out of consideration common carriers by trucks, impairment of the railway freight service, in the very nature of things, must result, to some degree, in adding to the burden imposed upon the highways. Or stated conversely, any diversion of traffic from the highways to the railroads must correspondingly relieve the former, and, therefore, contribute directly to their conservation. There is thus a substantial relation between the means here adopted and the end sought. . .
>
> Here the circumstance which justifies what otherwise might be an unconstitutional intereference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the state; and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to regulate the contract so far as it contemplates the use. "Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State." . . The principle that Congress may regulate private contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created . . . applies to a state under like circumstances.

The appellants' contentions under the equal protection clause were briefly discussed at the end of the opinion. The conclusion reached was that the claim of discrimination in favor of persons carrying certain specified commodities was not consistent with the interpretation placed upon the act by the state authorities. The contention that discrimination exists in favor of "shipper-owners" was thought without merit. In this connection the Court pointed out that, although certain provisions, such as those in regard to rates, can have no application as to owners transporting their own goods, other provisions germane to such owners are made applicable to them.

MR. JUSTICE BUTLER dissented.

The case was argued by Mr. John A. Crooker for the appellants, by Mr. La Rue Brown for the intervener, appellant, and by Mr. Elbert Hooper for appellees.

Work of the Selden Society

THE Selden Society which publishes the sources of Anglo Saxon Law reports that it has been able in 1932 to issue its regular volume early in the year and to distribute its bonus volume in May, 1932. The former was Mr. Hubert Hall's volume on the Law Merchant; the latter a Bibliography of Abridgments, Digests, Dictionaries, and Indexes of English Law up to A. D. 1800 by John D. Cowley.

The next volume is far advanced in the printer's hands, being Year Books of Henry VI, by H. C. H. Williams. It contains, among other things, a story well authenticated but quite incredible by those who watch our annual over-production of lawyers.

At the beginning of the reign of Henry VI there were some members of the Bar of the Court of Common Pleas and some Judges on the Bench who had been forced to become members of its Bar quite against their will.

A story more in line with our current thinking is that of Mr. Justice Tyrwhit of the King's Bench in A. D. 1411. He had agreed upon the Archbishop of Canterbury as arbitrator and the Archbishop's award was that the Judge should give a dinner to the parties to the arbitration, the menu to include two fat oxen and two tuns of Gascon wine.

Mr. Richard W. Hale, of 60 State street, Boston, is Secretary and Treasurer for the United States, and will answer any inquiries about publications and membership.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

WHAT PRICE REPUTATION?

Physical and Legal Remedies for Slander and Libel—Growing Tendency to Resort to the Courts—A Variety of Damages—Basic Principles of Workmen's Compensation Laws May Some Day Have to Be Written Into the Libel Law—A Libel Lexicon Suggested—Difficulties of Pecuniary Valuation Under Present Conditions—Libel By and Of the Dead, etc.*

By Morris L. Ernst and Alexander Lindey
Members of the New York Bar

It is untrue then that men, when they speak falsely, blacken the fame of a consistently good man, for that fame is written in the book of life, and the good man is a "mirror unspotted."

—Wyckliffe "De Civili Dominio."

"THE remedy for wrongs is to forget them," says Syrus in his Maxims. Man, however, is a vengeful animal. He seeks satisfaction, or escape. When he is assailed, he may either retaliate physically or use such other device as civilization creates as an alternative. Most of the slander and libel of our time is still answered by disdain, a sneer, a fist or a rejoinder. "You are one too," "So is your mother," and "Go to hell" are common phrases among children at play. Among adults the technique is not far different.

Only the sophisticated among us have learned to resort to legal remedies. It is often cheaper to punch an editor in the nose and pay a ten dollar fine for disorderly conduct than to invoke the complicated and expensive machinery of the law. Courts are a luxury. The primitive measures of retaliation—even a duel—are still more satisfactory in many situations. Our lower criminal courts attest to this. It has been estimated that in New York City alone more than twenty-five thousand cases of personal violence arising out of backfence slanders appear yearly on the calendars of the Magistrates Courts.

Although a poor man in the United States may enter in the civil courts with less discomfort and expense than in Great Britain, nevertheless all too often the winner in our courts is virtually the loser. Most of the trials in our land end in Pyrrhic victories. It may cost thousands of dollars to recover a few hundred.

As one effective means of maintaining the status quo and preserving property in the hands of those who hold it, the burden of the aggressor in a law suit has been made grotesquely heavy.

And yet in many cases there is no remedy other than litigation. Theoretically it has some advantage over the fight ring. Justice is determined more accurately by the use of courts than by the skill of strong right arms. The physically weak have a better chance in the matching of wits than in the matching of brawn. But even law is something less than certain. Tossing dice carries about the same odds.

As time goes on, more and more libel and slander assaults find their way into the court-rooms. Our ego circles grow. With modern devices for the spread of individual influence, there appears a corresponding desire for wider and greater power over others. Less and less are we content to confine our reputations within family or neighborhood groups.

A Variety of Damages

Throughout the development of the law, simplification is attempted by a constant process of subdivision. Originally if a jury found that a plaintiff was damaged by a libel, it would appraise all the factors of the situation and then cast its guess as to the appropriate figure. How far had the damaging words been circulated in the community? Was the accusation truly grievous? How rich was the defamer? How poor the defamed? Was there malice? Provocation? Retraction? If the plaintiff was gracious and comely, a percentage was added. If the defendant was cantankerous, a further sum would be added. Possibly the remarks caused the loss of a job or a contract. That surely would enter into the appraisal. These and the usual indefinable prejudices of the jurors made up the sum total.

Now we find damages divided legalistically into three categories: general, special and punitive. One or all of these types of damages enter into every libel suit.

General damages result if there has been injury to reputation, profession, calling, trade or other means of livelihood. No proof is required as to the amount.

Punitive damages—at times called exemplary damages—flow only in a case where there was malice. Whenever a court finds wilful, deliberate or vicious defamation, it is no longer concerned only with indemnifying the injured party, as in the case of general damages, but imposes damages as a punishment and deterrent. Even though the hurt may be no greater than to warrant general damages, a person suing for libel is lucky if he can prove malice and come within the rich emoluments that proceed from punitive damages. To get the extra prize offered in this category, special proof is necessary. The bounty has no relation to the injury suffered. Which is the more worthy of compensation—a malicious accusation "You are a rascal," or an un-

*This article is an extract from a book by Morris L. Ernst and Alexander Lindey entitled "Hold Your Tongue or Adventures in Libel and Slander." Published by William Morrow & Company.

intentional typographical publication—"You are a leper?" In the former case the award was five thousand dollars; in the latter seven hundred and fifty dollars.

Special damages are an attempt to bring science into the court room. If you lose a job because you are unjustly called a whelp, or if you miss out on a business contract because your enemy spreads the report that you are a mulatto, then you must prove to the jury how and what you have suffered. You do not forego your bid for general damages and punitive damages. This is just some velvet on the side. At times it comes in very handy because there may be no damage to general reputation, and yet there may be special items of injury which will appeal to the court.

In the appraisal of the money to be paid for libel there can be only the wildest sort of guesswork. Invisible factors are often the most decisive. One Cohen sued for libel on being called the black sheep of his family. There was no doubt that he had been injured, but his testimony in court was furtive and disreputable. One Levy, acting as foreman of the jury, made up his mind not to give Cohen a nickel. Upon withdrawal to the jury room for what is euphemistically called deliberation, a burly Irishman started the discussion by declaring: "I guess we won't give that greasy kike a cent." Whereupon Levy promptly switched his loyalties and fought for hours until Cohen went home with an award of five hundred dollars, not so much for being called the black sheep of his family as for being dubbed a kike by an Irish juror. At that price Cohen could have afforded the accusation at least twice a week. But Levy was loyal to his race.

A Libel Lexicon

Some day we may have to write the basic principles of Workmen's Compensation Laws into the libel law. A broken finger means so much per week, phozzy jaw brings double the award. Each physical infliction is categoried and appraised, based on maximums bearing a relation to the gross income of the injured, and minimums in proportion to the seriousness of the hurt.

On such theory we could classify mild terms such as drunkard, liar, infidel, whelp, villain, rascal and rogue as Class One: no lasting injury, penalty $100 an utterance, except when directed at the clergy or the members of the bar, in which event double damages would be allowed. In the case of clergy, the doubling would be out of respect to the cloth; in the case of lawyers, the increase would be predicated on the assumption that the words would be doubly injurious because the audience starts with a presumption of truth.

Spy, sneak, skunk, cuckold, itchy old toad, frozen snake, hoary headed filcher and man of straw—these would come into the second money at $200 a word. It would be well to penalize by separate words, thus putting an automatic throttle on phrases such as "shameful, scandalous skulduggery," which impressed one jury for several thousand dollars.

And so we could go on classifying words and phrases on the basis of their intrinsic noxiousness without weighing the awards in proportion to the wealth of the libeler or the social class of the claimant.

Surely such a system would save much time and money. An editor would know just what each word would cost him. He could take a fling on election night and call the opposition candidate for mayor a small or big vermin. And just before the radical weekly went out of business, we would find the leading banker called a shiny old eel.

This pigeon-hole scheme would save the community many a heartache and untold dollars. All the words and phrases just referred to have been the basis of protracted law suits terminating in a maze of conflicting valuations.

Some years ago one Watkins said of a competitor "Slippery Sam, your name is pants." Whereupon the forces of law were aroused. Watkins and Sam each retained counsel. These attorneys, not fully trained to represent their clients properly in this complicated field of law, each retained associate and trial counsel. Reams of clean foolscap were consumed in complaints and answers and demurrers. Motions on the pleadings, demands for bill of particulars, examinations before trial and the rest of the rigamarole, that makes for a decent life for members of the bar, consumed the time of judges and lawyers. The day in court arrived. Each side called many witnesses. Proof was taken that Watkins said those exact words; witnesses testified to malice, others to provocation. Sam testified to his great injury. Watkins offered to explain the meaning of his euphemism. A judge at five hundred dollars a week and twelve jurors at two dollars a day and about a dozen court attendants—all adults and sane—spent about a week of their lives on this great social problem.

After much deliberation the jury brought in its verdict—two hundred and fifty dollars for Sam. Score: Watkins loser by three thousand two hundred and fifty dollars, which included his counsel fees but counted nothing for time lost. Sam out two thousand seven hundred and fifty dollars including counsel fees and nothing counted for time lost; the State out about two thousand dollars for judicial expense.

Under our proposed system most of this money would be saved, and the time of all the witnesses and jurors could be redirected to normal and more worthy channels.

Libelee Sam would go up to a wicket window in the town hall. The windows would be arranged aphabetically. He would look for the letter S. Not because his name is Sam, but because the libel was *slippery*. The index clerk would look up his chart and find

Slippery ..... $250.00.

"Leave your papers here, we will notify Watkins. Only one question: Did he print it? We find the word *slippery* already classified. Now, my dear man, you had better go to the P window. You may get something for the word *pants*, although it's a new one on me. Take this card along so that the P clerk does not also have to check up proof of utterance."

Sam goes to the P's and finds that *pants* was never used. It hasn't been certified. The clerk tells him: "The nearest we find is that in the pre-scientific days, the old law courts once disapproved the words *"silly old petticoat"* as applied both to men and women.

There is no way of telling whether the libel was in the word *old* or *silly* or *petticoat*. But if you are willing to accept $22.00 for *pants*, we will pass the claim. If not, deposit your entrance fee of $50.00, and we will list you under *pants* for the next few weeks, and see how many other people in the city want that word adjudicated. Of course you understand that the judge lists the word in its proper category without any bearing on a particular charge. It's only a question of language, which the professors at the college look into. If you have never started one of these Connotation Cases, it may be worth your while to try it. You may win out and get *pants* put in the class of *pauper, pettifogger,* or *pestilent broker*. I know a man who got a thousand dollars back for his fifty dollars on *scab*."

Sam listens attentively while the clerk continues:

"By the way, sir do you prefer to play for a retraction? You know the rule, 50% discount for retraction. I'll have to take that up with Watkins if you sign this offer. Bear in mind we can't guarantee that the retraction will be given as much space as the original *Slippery Sam, your name is pants.*"

"No," says Sam, "I'll just take my money."

Sam either takes a chance or doesn't. No matter what he does, he's ahead. Every one is the winner and much of the loose glib talk that flows into print is automatically curtailed.

"Next please," says the clerk.

A kindly gentleman appears.—"*The New York Herald Tribune* printed a front page story about me quoting Secretary of the Treasury Mills to the effect that I am ignorant and deceptive."

"What's your name?"

"Franklin D. Roosevelt."

"Oh, you ran for President at that time, didn't you? Well, you're out of luck. No awards against Mills or the paper if you're in politics or hope to be. Don't you remember the statute that made all office-holders thick-skinned as a matter of law?"

"Oh yes, I recall. We decided, didn't we, that the public shouldn't be nursegirled? It must learn to weigh slanders and libels and discount most of them." Mr. Roosevelt starts to withdraw.

The clerk says: "Don't forget, you can also get back at Mr. Mills. I guess you can think up your own stuff. We are not allowed to make suggestions."

The line progresses. No writers, publishers, actors, musicians here; they have long learned that they have no claim; they have only the right to devise phrases in contradiction.

A manufacturer of automobiles advances in great heat. A competitor has advertised that his Excello car can't go more than twenty miles an hour, skids on turns and lasts only about a year.

"Too bad," says the clerk. "No claims on merchandise. How can consumers ever learn about the value of articles except out of the heat of controversy among the producers or the retailers?"

So it would go. Consumers, voters, readers would in time learn the art of appraisal. People would rely on their own judgment. Faith in one's own character would become more important than the doubtful estimates made by the mob.

Some Samples of Today

But under our present régime of pseudo-scientific law, with its high-sounding formulas of damages, what do we find?

A married woman was charged with being in a hotel with a man not her husband. The jury found that malice was evident. Award twenty-five thousand dollars.

A newspaper printed that "M, a white man who some time ago was suspected of burning his own store for insurance, started the fire that burnt down the entire village last night." No malice. Award twenty thousand dollars.

Think of it, five thousand dollars more for a charge jeopardizing the peace of one household than for one alleging the wiping out of an entire community!

Another newspaper published a series of stories charging a New York magistrate with flagrant misconduct, characterizing him as "bullying," "hectoring" and "unfit." The jury found the charges untrue and held that the libel—formulated without malice and in the aid of public reform—must be paid for to the tune of forty thousand dollars. This a higher court cut down to twenty-five thousand dollars, no doubt trying to bring adultery and judicial misconduct into some kind of alignment.

In another case a newspaper stepped beyond the pale of mere pleasantries. It sensationalized about a gentleman who obtained insurance on the lives of decrepit and aged persons, hastened their death, and collected large sums of money on the policies. The story went on to show how thirty of his insured had died of disease, twelve from poison, and fifteen others were then in mortal danger. The jury found that the tale was entirely untrue. The libelled person sued for thirty-six thousand dollars. No one can ever explain just how he seized that sum out of the air. Possibly three thousand dollars for each alleged poisonee. The jury thought this too much, and the entirely innocent Mr. X, charged with as revolting a crime as man could invent, walked out of the court with the amount of money that his wife would have received for a fortuitous remark about her sexual infidelity.

A woman, a drug addict, was arrested for stealing. During the arraignment a policeman noticed the name of Cody and asked whether she was related to Buffalo Bill. She said yes, and upon being further questioned admitted that she was the woman who used to do all the shooting in the show and that she had taken to drugs. The newspapers elaborated on this story. They wrote: "Annie Oakley, daughter-in-law of Buffalo Bill, lies in a cell at Harrison Street Station, sentenced for stealing the trousers of a negro in order to get money with which to buy cocaine." The news-item contained a sketch of Annie's life, emphasizing her popularity, her desire for drugs and her consequent downfall.

Within a short time after the article appeared, more than fifty newspapers faced suits for libel. In all but two of the cases Annie Oakley was successful, winning the suits and damages ranging from five hundred dollars to as high as twenty-seven thousand five hundred dollars, the last being against the main offender which had run follow-up stories, thereby adding insult to injury.

And that's how the expression "pulling an Annie Oakley" originated.

Try Your Own Hand

Let us assume that the following libels were given substantial publicity and that all were di-

rected against equally respectable persons. Let us further assume that in every case the lawyers on both sides were equally artful and cute in their techniques before jurors. What sums would you grant if you were the entire jury? As you read the list try to evaluate the injury.

I—*You are a slacker—if said during the war.*

II—*You are a slacker—if said after the war.*

III—*You have been divorced.*

IV—*The horse you were trying to sell was 21 years old. You said it was only 20 years old.*

V—*You have a police record.*

VI—*You have led an eventful life.*

(a) Applied to a woman—married.

(b) Applied to a woman—unmarried.

(c) Applied to a man.

VII—*You carry on rocky conversations with unprotected women.*

VIII—*You are a pacifist.*

IX—*You are a communist.*

X—*You are an Irish bullhead.*

XI—*You started suits in order to get one-half of the fines.*

XII—*You are an Englishman of more or less indifferent repute.*

XIII—*You are a little insignificant puppy.*

XIV—*You are a crank.*

XV—*You are the latest prominent assassin* (published by mistake, confusing you with Harry Thaw).

XVI—*You are of unsound mind* (a single letter sent to only one person, but resulting in the loss of a job).

In the following list you will find the amounts paid as damages for such libels:

I—Five thousand dollars.

II—Seven hundred and fifty dollars.

III—Eight hundred dollars.

IV—Five hundred dollars.

V—Five hundred to twenty thousand dollars.

VI—Two hundred dollars.

VII—Four hundred dollars.

VIII—Two thousand to seventeen thousand five hundred dollars.

IX—Zero up to two hundred and fifty dollars.

X—Three hundred and fifty dollars.

XI—Ten thousand dollars.

XII—Two hundred dollars.

XIII—Three thousand dollars.

XIV—One thousand dollars.

XV—Sixteen thousand dollars.

XVI—Three thousand dollars.

If you find discrepancies between your own appraisal of these insults and the values established by the courts, it is not surprising. The jurors themselves probably disagreed and reached the final figures only by compromise. But added to all of the perplexities which you experienced in estimating your own awards, you must appreciate that in the actual trials many additional complicating factors appeared.

It is difficult enough at times to put a pecuniary value on something objective, tangible, concrete, of current, practical use. It is next to impossible to measure the worth of something as elusive, as unsubstantial, as subjective as your neighbor's reputation.

By and of the Dead

Except for two states of the Union, there still exists one entirely safe way of perpetrating a libel. The pleasure is anticipatory, the effect never known. When you draw your last will and testament, you can insert exactly what you think of your relatives and competitors in trade. A delightful Englishman established the pattern. When his will was opened in front of his expectant nieces and nephews, they really became acquainted with the old gent for the first time.

"To my nieces and nephews, not a red farthing. They have been spongers and ingrates all their lives. They are incompetent and deceitful.

"To Annie K., I leave two thousand pounds, for she is in fact my illegitimate daughter.

"To Marie F., I leave my estate in Kent, in gratitude for the many years she lived with me clandestinely as my mistress."

And so it went on for pages and pages.

The beneficiaries were in a quandary. If they claimed their inheritances, they admitted the libels. If they renounced, people would say that they did so because they were afraid publicly to acknowledge the truth.

An amendment to this device commends itself for the more bitter and whimsical. After writing such a will, a codicil may be prepared revoking all the libelous bequests. The estate would not be out a cent, and the joy of the libels remain intact.

In some jurisdictions the executors are left in a dilemma. If they file such a will, they subject themselves or the estate to lawsuits for the utterance of a libel. If they don't, they are unfaithful to their trust as executors and subject themselves to civil and criminal charges for failing to probate a will in their possession.

A dead man, then, may by the device of a libelous will resurrect himself to hurl scandal at those he hated during his life. And by the same token he himself, although long departed, may become the object of obloquy.

A tombstone carver in the South was unable to collect his bill for one of his works of art. He removed the stone from the grave and chiseled out the name of the deceased. The family of the testator was outraged. The court held that this was an insult to the deceased and would reflect on the family. The stone was ordered replaced.

Oliver Goldsmith in his *History of Animated Nature* recounts that one McLauren, distinguished mathematician, was given to prodigious yawning, so that sometimes he could not proceed with his lectures. McLauren's son objected to this, and by means of threats prevailed upon the publisher of the book, though both McLauren and Goldsmith were dead, to expunge the statement. The renowned Dr. Johnson objected.

His statement summarizes the law even today in most jurisdictions. "It is of much more consequence that truth should be told than that individuals should be made uneasy. The uneasiness that a man feels on having his ancestor calumniated is too *nice*."

You may now defame the dead with complete immunity from civil suit. The only charge they can bring against you is criminal libel.

Incompetents

They may libel your father or mother, the pain may be greater than if the attack were made directly on you; but the courts with unconscious pre-

Freudian wisdom have divorced children from their parents in the field of libel.

Infants may sue in many jurisdictions. The theory is that in later years they may engage in business and scandal may hurt their mercantile success. The child labor laws have cut down these rights in many states, but even where children are sensitive to defamation, no court has endeavored to establish anticipated values based on expectancy of life. Obviously it could be argued that a child, if hurt by libel, suffers a more serious injury than an old man of seventy-five. The latter's reputation, no matter how carefully nurtured, has a possible life expectancy of only three or four years. A minor would have to suffer for many decades.

Although a child may not sue and recover for an insult cast at either parent, a husband may recover in certain cases for the hurt one does to his wife's reputation. At times the male spouse is permitted to recover special damages in excess of the amount allowed the wife. All of this harks back to the days when a married woman was, by reason of her marriage, deemed an incompetent. It will pass with the freeing of woman into a complete adult status in the eyes of the law.

On several occasions the judges were confronted with the problem of whether a lunatic may sue. Can a lunatic have a reputation? If so, can it be damaged? The best authorities on law suits of the mad indicate that fools and madmen are tacitly excepted out of all law. To be consistent, the exemption has been made to flow both ways. A madman is punished only by his madness. No judgment may be obtained against an insane person for slander. This rule is not so simple to apply. When is a madman mad? What if he utters a s'ander on the eve of his departure over the brink? The purpose of libel laws, we are told, is non-punitive and merely retributive. Why should a rich lunatic be allowed to keep his gold if he destroys a reputation?

Drunkenness is of course no defense as a matter of law, although in the wet districts of America words spoken while in liquor are viewed with leniency by all jurors.

The Lonely and the Lowly

A hermit sitting with his fishing pole and his inward contemplations, is in an ideal position. He may practise his hand at slander and libel. Money judgments against him are valueless. At the same time he is immune from libel. Having withdrawn from the foolish life of the rest of us, he cares not what people say or write about him. With justice he is rejected by the courts except on one cause of action. If it is published that he is not a real hermit, then a vulnerable spot has been pricked and his standing in court becomes legitimate.

The greatest anomaly under our present system is the poor man. Reputation seems to bear a direct relation to wealth. A mechanic earning a meagre salary, no matter how exemplary his life, is presumed to have less delicacy of feeling than a millionaire banker. To call him a *miserable scab* or an *ex-penitentiary bird* or even *a pauper* would not bring a tenth of the sum that a wealthy banker could demand. The salaried mechanic may be more sensitive than the banker to such accusations. If, as it is said, the murder of a reputation can hurt as much as the murder of life, by what reasoning do we continue to depreciate the feeling of the poor and the lowly?

As a compensation, however, the poor man has far greater latitude in defamation than a rich man. A civil suit against him is pointless, for if a judgment is obtained it is uncollectible. In that way the poor inherit the earth.

These problems that concern the status of the defamer and the defamed call for thorough reappraisals. A hardy workman, insensitive to pain, contemplative about life, essentially gay in spirit, loses one hand at a paper making machine. The law says that he shall receive twenty-one dollars a week. It makes no difference that the machine belonged to a rich corporation. The carelessness of the operator does not add or detract a penny from the award.

In an adjacent factory another man also runs his hand into the jaws of a machine. He too has a disastrous amputation. He comes up for his award. Do we listen to him when he urges that his pain was greater than that of the other man? Do we pay him less just because his employer is poor? Do we increase his award because his employer was grossly neg'igent? He never got any happiness in life except out of bowling and baseball, sports now sacrificed with the loss of his hand. The contemplative workman was a reader: emotionally he wasn't hurt nearly so much.

We have learned that to listen to such plausible arguments merely invites insuperable inequalities. Twenty-one dollars a week is the award. Injustices increase as inept man tries to equalize on the basis of subjective factors. Too much depends upon whether the judges are baseball fans or library hounds.

To transmute reputations into gold is beyond the capacity of man. We must first find a new Philosopher's Stone.

THE COURT HOUSE*

By HON. WENDELL F. STAFFORD

This is that theater the Muse loves best;
All dramas ever dreamed are acted here,
The roles are done in earnest, none in jest;
Villain and dupe and hero, all appear.
Here falsehood skulks behind an honest mask,
Here witless truth lets fall a saving word,
While the blind goddess tends her patient task;
And in the hush, the shears of fate are heard.
Here the slow-shod avengers keep their date;
Here innocence unfolds her snow-white bloom;
From here the untrapped swindle walks elate,
And stolid murder goes to meet his doom.
O stage more stark than ever Shakespeare knew,
What peacock playhouse will contend with you?

(*The above sonnet was recited by former Chief Justice Stafford of the Supreme Court of the District of Columbia at the Phi Delta Phi dinner during the recent convention of the American Bar Association. It is taken from "The Brief," organ of that fraternity, in a recent issue of which it was published.)

DEPARTMENT OF CURRENT LEGISLATION

Federal Legislation, Continued

By Charles F. Boots, John O'Brien, Allan H. Perley and Eugene J. Ackerson
Office of Legislative Counsel, United States Congress

THE movement for reduction of expenditures in the operation of the Federal Government found expression during the last session of Congress not only in smaller appropriations carried in the regular appropriation Acts but also in a far-reaching program called the "Economy Act." This legislation is contained in Part II of the Legislative Appropriation Act for the fiscal year 1933 (Public 212).

During the fiscal year 1933, the compensation of all Federal officers and employees whose annual compensation is in excess of $1,000 and less than $10,000 is reduced by 8 1/3 per centum by the so-called "furlough" and "pay-cut." Per diem employees are to work not more than five days in one week and employees whose compensation is on an annual basis are to be furloughed without pay for the equivalent of one calendar month in the year. Those who are exempted from the provisions of the furlough (mainly persons in the legislative branch of the Government, judges, and those whose positions must be continuously filled and for whom substitutes can not be provided) are subjected to a pay cut of 8 1/3 per centum if the compensation is in excess of $1,000 but less than $10,000 per annum. Greater reductions are provided in the case of those receiving higher salaries. Retired pay of commissioned personnel of the military and naval forces and of judges is correspondingly reduced. A general exception exempts officers whose compensation may not under the Constitution be diminished but provision is made by which an amount equal to the reduction which would be applicable may be turned back to the Treasury by the officer. Corporations the majority of the stock of which is owned by the United States are to apply the furlough and pay-cut to their employees. (Title I.)

Automatic increases in compensation are prohibited and administrative promotions are suspended during the fiscal year 1933, and vacancies may not be filled in the executive departments except in essential positions and then only with the approval of the President. (Secs. 201, 202 and 203.)

Travel and subsistence allowances and overtime compensation are reduced (Secs. 206-211). Retired commissioned officers of the military and naval forces may not receive from a Federal position and from their retired pay a total of more than $3,000 per annum unless they were retired for combat disability (Sec. 212). Whenever personnel reductions are to occur, married persons employed in the class to be reduced are to be discharged first if the other spouse also is employed by the United States or the District of Columbia, and preference is given in appointments to the civil service to persons whose spouses are not in the Federal employ (Sec. 213). During the fiscal year 1933 annual leave with pay is prohibited and thereafter such leave is reduced to 15 days (Secs. 103 and 215).

The printing bill for the fiscal year 1933 is cut to $8,000,000 and the paper bill to $400,000. The Director of the Budget is given power to distribute the funds for printing and paper among the various departments and establishments as the needs of the service require. (Sec. 302.)

Appropriations for construction of public buildings are reduced by 10 per centum; leases of buildings must be made for a money consideration only, rent paid by the Government is not to exceed 15 per centum of the value of the building, and not more than 25 per centum of the amount of the first year's rent may be spent for alteration or repair of rented premises. (Secs. 320-322.)

The fees of jurors and witnesses are reduced during the fiscal year 1933. (Sec. 323.)

A general provision authorizes, during the fiscal year 1933, the transfer, with the approval of the Director of the Budget (or the President in the case of the War or Navy Department), of not to exceed 12 per centum of one appropriation for a department or establishment to another appropriation for the same department or establishment, but the appropriation to which the transfer is made may not be increased by more than 15 per centum by all transfers. (Sec. 317.)

A general provision subjects the expenditure of money, whether under Acts passed before or after the Economy Act, to its provisions. (Sec. 803.)

The President is given general authority to effect, by Executive order, reorganizations in the Executive branch in order to group its executive and administrative agencies according to major purpose; to reduce the number of such agencies by consolidating those having similar functions; to eliminate overlapping and duplication of effort; and to segregate regulatory agencies and functions from those of an administrative and executive character. This authority of the President is, however, subject to limitations. Any such Executive order must be transmitted to Congress and is not to become effective until 60 days after transmission unless approved before that time by concurrent resolution of Congress; and any such Executive order disapproved in whole or in part by either branch of Congress within the 60-day period is to be null and void to the extent of such disapproval. In order to expedite the reorganization program, the President is authorized and requested to proceed, without regard to the provisions above referred to, with "set-

ting up consolidations" of certain specified governmental activities. (Title IV.)

The Act itself provides for certain particular consolidations and reorganizations. (Secs. 306; 501-514.)

Public 303 reduces the interest rate on loans to veterans upon the security of adjusted service certificates from 4½ per centum to 3½ per centum per annum, compounded annually. It further makes adjusted service certificates eligible as security for loans immediately upon the issuance of such certificates. Prior to the enactment of this Act such certificates had no loan value until the expiration of two years from the date of their issuance.

Veterans who joined the march to the capital to urge the payment in full of adjusted service certificates were provided with funds to return home by Public Resolution 35, as amended by Public Resolution 39. All amounts expended for such purpose for any veteran constitute a loan without interest, which, if not repaid, will be deducted from any amount payable upon the adjusted service certificate.

Public Resolution No. 5, providing for the so-called "moratorium" on intergovernmental obligations, is the principal contribution of the first session of the Seventy-second Congress to statutory law affecting our international relations. The resolution provides for the postponement of amounts payable to the United States from foreign governments during the fiscal year 1932, and the payment of the postponed amounts over a ten-year period beginning July 1, 1933. An important declaration is found in section 5, which reads as follows:

> Sec. 5. It is hereby expressly declared to be against the policy of Congress that any of the indebtedness of foreign countries to the United States should be in any manner canceled or reduced; and nothing in this joint resolution shall be construed as indicating a contrary policy, or as implying that favorable consideration will be given at any time to a change in the policy hereby declared.

Public No. 149 contains several amendments to the naturalization laws, and at least one important immigration provision. The privilege of the short method of naturalization afforded during the World War to persons in the military service and extended to veterans from time to time is extended for another two years, except that as additional requirements (1) the applicant must have resided continuously within the United States for at least two years preceding the date of petition, in pursuance of a legal admission for permanent residence, and must furnish proof of good moral character during that period, (2) a certificate of arrival is required if such admission was subsequent to March 3, 1924, and (3) final action on the petition is withheld until 90 days after filing (Sec. 1 (a)). It is also provided, apparently as a precautionary measure, that any petitions for citizenship which were filed by aliens while with the American Expeditionary Forces, which have not been acted on, shall be invalid for all purposes (Sec. 1 (b)). Enlistment in the National Guard or naval militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, no longer gives special exemption from the general provisions of the naturalization laws (Sec. 2). Another provision permits aliens who have been lawfully admitted to the United States for permanent residence to count service on American-owned vessels (even though not of American registry) as residence for the purposes of the naturalization laws (Sec. 3). (In *McDonald v. United States*,[1] it had been held that an alien lawfully admitted to the United States, who had established, and, since his admission, had maintained, a residence in the United States, but who served continuously as master of a vessel of British registry belonging to a New Jersey corporation, could not count any part of such period as residence for naturalization purposes). A new certificate of citizenship may now be issued to a naturalized citizen whose name has, subsequent to naturalization, been changed by order of a court or by marriage (Sec. 4 (a)). Under the new law certificates of arrival will no longer be required (1) in the case of citizens who are applicants for certificates of citizenship based on their having derived citizenship through other petitioners or by marriage (Sec. 5), or (2) in any naturalization proceeding, in the case of applicants who entered the United States on or before June 29, 1906, the date of our present general naturalization law (Sec. 6). Under the Act of March 4, 1929, an alien once deported was forever barred and excluded from returning, and entry thereafter was made a felony. The new law permits relaxation of this rule if the Secretary of Labor grants permission for the alien to reapply for admissoin to the United States; but no return is possible after one year after deportation nor may an alien not otherwise admissible take advantage of the provision (Sec. 7).

Several new provisions designed to relieve the inhabitants of our Territories and insular possessions from the rigid application of the immigration and naturalization laws were enacted. Public No. 198 grants non-quota status to natives of the Virgin Islands now residing in foreign countries, and relieves such aliens from a number of the general requirements of the immigration laws. The Act also confers citizenship upon natives of the Virgin Islands who on the date of its enactment reside in the continental United States, the Canal Zone, or any insular possession or Territory of the United States, who are not citizens or subjects of any foreign country, regardless of their place of residence on January 17, 1917. Residence in the United States or the Virgin Islands on the latter date had been the test under the Act of February 25, 1927, conferring United States citizenship upon certain inhabitants of the Virgin Islands. The two provisions last noted it is hoped will eliminate some of the confusion remaining after the enactment of the 1927 Act, and clarify the citizenship status of natives of the Virgin Islands, many of whom are aliens and, even now, are unaware that they occupy that status. Public No. 248 extends the benefit of the women's special naturalization provisions to certain women born in Hawaii prior to June 14, 1900, the date upon which the United States formally acquired jurisdiction over Hawaii. Under the present law, while women who were citizens of the United States at birth may be naturalized by the short method under the Act of March 3, 1931, regardless of their race, a small number of Hawaiian-born women of the Mongolian race, who lost United States citizenship by marriage are not able to take advantage of that Act, since they were born in the former kingdom or the succeeding Republic of

1. (1929), 279 U. S. 12.

Hawaii and hence were not citizens of the United States at birth. This despite the fact that their former sovereignty has ceased to exist with the transfer of allegiance to this country.

Public No. 61 makes instrumental musicians definitely subject to the contract labor law except for individuals of distinguished merit and ability as instrumental musicians or as members of a musical organization of distinguished merit, and unless the professional engagements within the United States of the individual or organization, as the case may be, are of a character requiring superior talent.

Public No. 234 amends section 15 of the Immigration Act of 1924 (1) by including the attendants, servants and employees of Government officials within the classes of non-immigrants who are admitted upon the condition that at the expiration of the time for which they are admitted or upon failure to maintain the status under which admitted they will depart from the United States; and (2) by permitting the requirement of bond in the case of non-quota students.

Public No. 266 amends the provision of the Immigration Act of 1924 granting non-immigrant status to so-called "treaty aliens" in three particulars: First, it is definitely stated that the entry must be solely to carry on trade "between the United States and the foreign state of which he is a national," and not for the purpose of engaging in purely local trade; second, the words "present existing," as applying to the treaty under which the privilege must be claimed, are omitted, thus extending the privilege to aliens coming within the provisions of treaties of commerce and navigation concluded subsequent to the passage of the Immigration Act of 1924; and third, there is added to the aliens specifically entitled to admission under this classification the wife of the alien merchant and his unmarried children under 21 years of age, if accompanying or following to join him. Since the provision referred to has been interpreted to permit the entry of the wives and minor children of treaty aliens,[2] the specific inclusion of the wives and minor children was apparently designed to exclude wives by proxy or picture marriages, and children by adoption, specifically excepted from the definitions of "wife" and "child," respectively, found in section 28 of the 1924 Act.[3] Thus, what is on its face a broadening of the provision becomes a restriction by virtue of limitations in the statutory definitions of the classes included.

Public No. 277 gives non-quota status to husbands of American citizens by marriage occurring prior to July 1, 1932. The prior law was limited to husbands of American citizens by marriage which occurred prior to June 1, 1928.

Public 189 makes the transportation in interstate or foreign commerce of any person kidnaped and held for ransom or reward a felony punishable by imprisonment for such term of years as the court, in its discretion, shall determine. A conspiracy to violate the Act is made punishable in like manner. The Judiciary Committee of the Senate in its report on the bill recommended its passage in order to aid the States in coping with the increasing number of kidnaping offenses and with the handicaps in the detection, arrest, and conviction of offenders arising from the existence of State boundaries.

Public 274, on which hearings had been held before the Lindbergh kidnaping case, was spurred on its way to become law by that crime. It provides heavy maximum penalities of fine and imprisonment for any person who knowingly sends through the United States mails any communication containing any threat (1) to injure the person, property, or reputation of any person or the reputation of a deceased person, or (2) to kidnap any person, or (3) to accuse any person of a crime, or containing any demand for ransom or reward for the release of any kidnaped person. It further provides for the punishment of any person who, with intent to extort money from any person, uses the mails of any foreign country for the transmission of any communication of the nature above described, addressed to any person in the United States, and thus secures the delivery thereof through the foreign and United States mails. Existing provisions of the Criminal Code[4] relating to the use of the mails in schemes to defraud had been held not to include schemes to extract money by threats of murder or bodily harm.[5]

Public 209 provides for the use of one or two alternate jurors in the trial of indicted offenders in the courts of the United States when the judge of the trial court believes that the trial is likely to be protracted. If, before final submission of the case, a juror dies or becomes so ill as to be unable to perform his duty, the court may substitute one of the alternate jurors. This practice has been adopted by twelve States. The report of the Judiciary Committee of the House indicates that the Act follows almost literally the California statute which was held not repugnant to the section of the State constitution providing that the right of trial by jury should remain inviolate.[6] Trial by jury under the provisions of the United States Constitution means a trial by jury as understood and applied at common law.[7] Since the jury which renders a verdict under the alternate juror system is composed of twelve jurors who have sat all through the trial, no constitutional objection appears tenable.

Public 210 clarifies uncertainty and secures uniformity as to date of commencement of sentences of imprisonment, and prevents juggling of sentences to obtain benefits of the parole laws, by fixing the commencement of sentences of imprisonment at the date on which the offender is received at the penal institution for service of the sentence or the date he is received at the place of detention to which he is committed to await transportation to the institution where the sentence is to be served. Prisoners sentenced after the date of the Act, who are released on parole, shall not be allowed any deduction for good conduct from the maximum term of their sentences, and prisoners upon release after service of their sentences with deduction for good conduct shall be treated as if released on parole until the expiration of the maximum sentence imposed.

Public 169 authorizes United States district attorneys in charge of the prosecution of an offender

2. Cheung Sum Shee v. Nagle (1925), 268 U. S. 336.
3. House Report No. 341; 72nd Congress, first session.
4. U. S. C., title 18, Secs. 338 and 339.
5. Fasulo v. United States (1926), 272 U. S. 620.
6. People v. Peete (1931), 54 Cal. App. 333; 202 Pac. 51.
7. Patton v. United States (1930), 281 U. S. 276.

charged with the commission of an offense punishable in any court of the United States or the District of Columbia, to forego such prosecution, and to surrender and deliver to State authorities at the expense of the United States any such offender under 21 years of age. Such surrender must be preceded by a finding by the Department of Justice that the offender has committed a criminal offense or is delinquent under the laws of the State, and that the State will take him into custody, and that it will be for the best interests of the United States and the person involved to surrender him to the authorities in the State. The consent of the offender, or a demand by the State authorities upon the United States district attorney similar to that required in the extradition of fugitives from justice[8] is also required before such person can be conveyed from one State to another. The Act will affect about 2,000 juvenile offenders annually, a large part of whom are violators of the National Motor Vehicle Theft Act.

8. U. S. C., title 18, Sec. 662.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LEGISLATIVE REGULATION: A STUDY OF THE WAYS AND MEANS OF WRITTEN LAW, by Ernst Freund. 1932. New York: Commonwealth Fund, Pp. viii, 458.—"There ought to be a law against it." Thus does the vexed, the perplexed, the enraged or the outraged citizen speak, who, seeing red, questions neither the hows, the whys, nor the wherefores. And this is the foundation of the problems which Professor Freund handles in his book that appeared shortly before his sudden and much lamented death.

To understand the comprehensiveness, the value and the significance of "Legislative Regulation" one must appreciate and understand Professor Freund's method of approach. A thorough, systematic handling of a comprehensive subject, a treatise which is more than merely legalistic, being economic and even psychological in its implications—this is the contribution which Freund makes by this book and which again stamps him as a pioneer.

The book is divided into five parts. The first deals with "Legislation as a Form of Law." Herein, legislation is distinguished from other types of law, and its value pointed out. Starting with the natural distinctions between written and unwritten law, the writer approaches what he terms "Government-legislation" and "Law-legislation" and then subdivides his subject into general and special legislation. The second portion of the book deals with regulation from a legal point of view. The approach here is not whether it is advisable to have this "type of written regulation" but rather, "will this type of regulation be enforceable legally?" Under this, the chapter headings are concerned with "Methods and Forms," "Policies and Standards," and "Limitations on Legislative Powers as a Legislative Problem." The third part, "Phraseology and Terms," is self-explanatory. It illustrates the limitations of word symbolism to achieve desired ends, and, above all, is essentially practical. The last two parts, called respectively "The Technique of Penal Regulation" and "The Technique of Civil Regulation," show how and why various types of regulation may be made workable and effective.

"The declaratory rule is in the nature of a rule of decision." "The regulative rule is the expression of government, in the nature of a rule of conduct." It is the latter aspect with which the writer deals. The amplification of the subject makes the book much more than a draftsman's manual—makes it a revelation and a guide to the thinking lawyer and layman.

From a technician's point of view, the book is thorough and valuable. Freund's knowledge of the laws of many countries not only serves to illustrate his contentions, but in many cases underlies his analysis. His use of many illustrations and source material generally, although the quantity of this is illogically deprecated by the author in his preface, will be found to be clarifying and valuable. Besides footnotes, use has been made of text-notes, sometimes explanatory, more often ramifying the preceding textual matter.

One of the outstanding chapters is that on written and unwritten law. The value of this chapter lies in the light it throws on a differentiation usually taken for granted but frequently not appreciated.

From the strictly legislative point of view and from that of the draftsman, Part III concerning "Phraseology and Terms" is most valuable. The first part of this deals with "The Language of Legislation" and in it is shown the difference between legislative and political language, legislative and judicial language, and finally legislative style. In the latter chapter, Professor Freund offers a number of valuable hints, a compilation of several authorities from publications many of which are out

of print, under the heading "Canons of Style." This note has been printed in the Report of the American Bar Association, but it is here made more accessible. The next section, 55, on the choice of phrasing and terms, is a revelation of technique in the interpretation as well as in the drafting of laws.

The last grouping in this part of the book is most practical: it deals with actual terminology; the advantages and disadvantages of indefinite terms in various branches of regulation; it differentiates and discusses actual terms often used and misused. For example, in section 58, Professor Freund shows that "an official power granted in indefinite terms means a discretionary power." The effect of various words and phrases is carefully shown. Adulteration, restraint of trade, indecency have a more or less settled context, for example, while exploitation, manipulation and delinquency, to mention a few, have an uncertain statutory status.

Practical from another aspect are the last two parts of the book, the "Technique of Penal Regulation" and the "Technique of Civil Regulation." Detailed as the elucidation may appear, its value lies not so much in the actual data given but that it illustrates the definite need for an understanding of the subject and consequent legislative action.

The "Technique of Penal Regulation" is subdivided into publicity and checking provisions, provisions concerning licenses and orders, and finally those concerning enforcement. Under the head of publicity and checking provisions, have been discussed in detail such subjects, among others, as designations, marks and signs, private records, and provisions requiring registration. Chapter XI deals with enforcement provisions, and in connection with this it is interesting to quote the author (section 84): "Enforcement clauses form a constant feature in the diversity of regulative legislation and it is therefore surprising how little thought has been given to them either as to general principle or as to detail."

Under the title "The Technique of Civil Regulation" are discussed, in Chapter XII, "Prerequisites to the Validity of Acts," in Chapter XIII, the problem of defect and error in the application of civil regulations, and in Chapter XIV the provisions regulating the application and effect of statutes. This is to a great extent in the draftsman's field, but lawyers obtain aid and guidance therefrom.

"Policies and Standards" is the title of a chapter in which are discussed two important subjects. The first is called "Selection and Exemption." In this is shown the care which is required to "avoid undue favor on the one hand and unnecessary burden on the other." A list of considerations to serve as a guide in legislative selection and exemption is given and discussed. The second, called "The Question of Freedom from Regulation," shows underlying historical and economic development before the author again attacks the problem from the legislative standpoint.

Another minor section, but important to the draftsman and legislator, is upon severability clauses (Section 40). Legislative practice has been to include the so-called severability clause as a desirable solution to the problems of partial unconstitutionality, and, having grown accustomed to such inclusion, it is somewhat of a surprise to find that the writer considers this type of phrase of doubtful value, saying "they illustrate the difficulty which a legislature finds in meddling with declaratory law."

A review perhaps should contain a comparison of the reviewed book with others on the same subject. But there are no others which in breadth of subject and amplitude of detail can be compared with "Legislative Regulation." Only one comment can be made, the one usually applied to his "Administrative Powers"—Ernst Freund was a pioneer; he has pointed out the paths for others to go further, but so well has his task been done, that it will take time and another giant intellect to approach his accomplishment.

The hundreds of lawyers who enjoyed the privilege of having been of Professor Freund's law students, and his numerous coworkers and admirers, on and off the University of Chicago Law faculty, may point with justifiable pride to these two books as being the product of a real student and scholar, whose enthusiasm never waned and whose thoroughness is here conclusively demonstrated.

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Administrative Powers over Persons and Property: A Comparative Survey. By Ernst Freund. 1928. Chicago: University of Chicago Press. Pp. ix, 585. —The purpose of the survey is to obtain a comprehensive view of the major problems of administrative law and to make a comparison of regulative legislation which would reveal the extent to which statutes operate through powers and the relative use of licenses and orders, and of discretionary and non-discretionary action. A thorough study of this book can lead only to the conclusion that it fully accomplishes its purpose.

There is reflected in this work minute study of statutes and judicial decisions (state, federal, British, German and Prussian), elucidating the theory of administrative control prevailing in each jurisdiction, the comparison of statutory formulation of analogous provisions, and the consideration of the comparative expedients used for effecting the same legislative objective. In innumerable instances the author considers the possible alternatives which present themselves for coping with an administrative problem, and states the consequences attendant on each and recommends the most feasible alternative. He supplements his conclusion with valuable suggestions for the solution of existing defects. The theoretical discussion is invariably enriched by reference to specific statutory enactments embodying the precise point under consideration. Because of the vast amount of statutory and judicial precedent examined and coordinated, the completeness of the work both as to detail and territorial scope is impressive.

Because of its scholarly analysis of the various forms of administrative control, this book should be of value to the conscientious legislator or draftsman in assisting him in determining the most feasible way in which to formulate proposed legislation involving administrative powers. Tendencies in legislation concerning administrative powers are frequently noted, in illustration of which is the following quotation: "There is a tendency to give to administrative findings of fact, where the authority

acts semi-judicially, at least the effect of the findings of a jury."

Illustrative of the breadth of the treatise is the following comparative analysis: "In Germany, it seems to be assumed that an administrative power carries with it the power to ascertain facts necessary for intelligent action. . . . There is nothing in the English or American law like the German general executive authority to obtain information by requiring answers to questions . . . In England, the royal authority to issue commissions of inquiry has been denied. . . The legislative policy of New York is to grant examining powers with liberality. . . In the legislation of Congress examining powers have become conspicuous since the advent of comprehensive regulatory legislation beginning about 1880."

The scope of the book is further revealed by mentioning some of the topics treated. The first half of the book, after a definition of terminology used, is devoted to an analysis of administrative powers, considering *inter alia*: legislation operating without use of administrative powers; an analysis of the structure of organization of administrative authority; the bearing which tenure and qualification have upon competence of public service; the two means by which administrative control is effected—enabling power, which is the more common, and directing power; non-discretionary administrative determinations; regulation and operation of enabling powers; administrative orders, their function and enforcement, and suggested methods for more effective enforcement; judicial protection against abuses; summary power; administrative versus statutory regulation, comparative flexibility of each; remedial provisions, administrative review, judicial review; mandamus, certiorari; review of decisions involving discretion, etc.

The second part of the book, denominated "descriptive part," covers specific statutory provisions operating with the aid of administrative powers. The administrative powers particularly discussed are in connection with public utilities, merchant shipping, legislation concerning insurance, trade, labor, control of professions, religious, educational and political action, safety, health, morals, personal status, use of land, and revenue. The practical significance of this part of the book, because of its discussion of everyday problems, is apparent.

The constructive contribution made to the science of legislation pertaining to administrative powers is illustrated by the following passage dealing with revocation of licenses: "There should be a general provision for rescinding licenses illegally obtained. Occupational licenses should not be annual. Revocation should not be mandatory. . . If the ground of revocation is a criminal act, the commission of the act should be established by a criminal conviction. . . Administrative revocation should be subject to judicial review. . ."

No more comprehensive and accurate guide to a study of administrative powers can be found than in this thorough treatise.

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The Modern Corporation and Private Property, by Adolf A. Berle, Jr., and Gardiner C. Means. 1932. New York: Commerce Clearing House, Inc. Pp. xiii, 396.—Many people were surprised that the straw vote of the students at Columbia University School of Law showed a heavy majority for the Socialist candidate for the presidency, as contrasted with the Republican and Democratic representatives. Mr. Thomas polled by far the largest vote. This fact will come as no surprise to readers of this volume by two of the Columbia Law faculty, for the jacket contains the statement below the title, *"A study of the break-up of Private Property."* And the last two sentences of the peroration which closes the last chapter in the book, "The New Concept of the Corporation," read as follows: "The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, *but possibly even superseding it as the dominant form of social organization.* The law of corporations, accordingly, might well be considered as *a potential constitutional law for the new economic state,* while business practice is increasingly assuming the aspect of economic statesmanship." (Italics the reviewer's.)

Of course, while corporations, like every other human institution, have their advantages, it is hard for an ordinary mind to grasp the corporation superseding the Constitution of the United States. Nor do we believe that sensible minded persons will agree that in the rules of corporation law may be found "a potential constitutional law for the new economic state," whatever "the new economic state" may or may not be.

The early chapters are interesting, and evidently represent the research of Dr. Means. In these chapters it is endeavored to establish that "ownership of wealth without appreciable control and control of wealth without appreciable ownership appear to be the logical outcome of corporate development." (p. 69). Much evidence is adduced to support this thesis, and the charts and tables are interesting and suggestive. This portion of the book, which deals with economics and sociology, is valuable.

The legal views set forth by the authors, for which doubtless Mr. Berle, of the faculty of law in Columbia University, is responsible, are open to grave criticism. The authors fail to recognize the amazing adaptability manifested by our common law and equity courts in meeting the new problems which have been created by the development of corporation law. Their highly touted theory of "Corporate Powers as Powers in Trust" (p. 354), is no new "discovery" as proclaimed by the authors, but is simply an adaptation of elementary doctrines of law which afford a ready means of maintaining a proper relation between the managerial group and the stockholders in general. If some courts have failed to realize their powers and to apply these rules intelligently, the blame lies with the particular court, but in general it may be said that our courts have shown an intelligent realization of the implied obligations of corporate entities and their managers.

In Chapter V, dealing with "the legal position of management," the failure to refer to the epoch-making opinion of Chief Judge (now Mr. Justice) Cardozo, handed down early in 1931 (over a year before the date of the preface, July 1932), in the case of *People v. Mancuso*, 255 N. Y. 463, 175 N. E. 177, 76 A. L. R. 514, is amazing. In that case it was definitely stated that directors must manifest "good faith *and* obedience to the law *and* reasonable diligence." (Italics the reviewer's). Judge Cardozo further said: "The diligent director is the one who exhibits in the performance of

his trust the same degree of care and prudence that men prompted by self interest generally exercise in their own affairs." By accepting the office of director, a man takes along its burdens, responsibilities and penalties. A large part of the authors' discussion would have been unnecessary if cases like this had been carefully studied and their rules applied. Certainly it is not quite fair to blame courts for insufficiency and inadequacy in meeting problems, where their recent earnest and vigilant attempts to meet and solve them are either overlooked or ignored. A case like the Mancuso case travels far beyond the early cases cited by the authors, such as *Charitable Corporation v. Sutton*, 2 Atk. 400, decided in 1742, because in the Mancuso case it was ruled that liability would be criminal as well as civil if, in the event of the insolvency of a monied corporation, it appeared that the directors were lacking in any one of the three-fold duties owed by them, viz: (a) obedience, (b) diligence, (c) loyalty.

At p. 335 the authors state, "Since powers of control and management were created by law, in some measure this appeared to legalize the *diversion* of profit into the hands of the controlling group." Such radical statements show the hand either of an amateur or a sensationalist. Things are either legal or illegal. Law either sanctions them or it does not. The profits of a corporation properly may be disbursed only in accordance with the terms and conditions set forth in the articles of incorporation or charter, which constitute a contract between the corporate entity and its stockholders. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (16 U. S.) 518. If corporate profits are disbursed in accordance with these provisions, such payment cannot be regarded as a "diversion." If the profits, on the other hand, are diverted into the hands of the controlling managers, in disregard of the provisions of the incorporation certificate, this act constitutes a conversion or breach of trust, for which both the common law and equity afford a complete remedy to dissenting shareholders. *Stone v. Holly Hill Fruit Products, Inc.* (1932) 56 F (2d) 553; *Continental Securities Co. v. Belmont* (1912) 206 N. Y. 7, 99 N. E. 138; *Towers v. African Tug Co.* [1904] 1 Ch. 558.

Much of this volume is suggestive and provocative of thought, but it is marred throughout by its sweeping condemnations as well as its general trend, emphasized by the bold statement on the flap, that the authors are engaged in "A study of the break-up of Private Property." The reviewer wishes Professor Berle and Dr. Means a long and happy life, and assures them that neither they nor their children, nor their grandchildren, will see in this country "the break-up of private property."

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Red Russia, by Theodore Seibert, translated from the third German edition by Eden and Cedar Paul. 1932. New York: The Century Co. Pp. 422.—Here is a work ambitious in its scope but trying to cover too much ground for a volume of some 400 pages. The result is that no one subject is dealt with adequately. In the introductory two chapters the author attempts a psychological sketch of the pre-war Russia. Here we learn, among other things, that tsarism was doomed because of certain "whisperings of the Westerners (Germans)" which told the Russians that it was antiquated; that the Russians were a nomadic people, a "migratory folk"; that among other weaknesses, they exhibited a "proneness to conspiracy," et cetera. These surprisingly original deductions are reminiscent of a traditional, characteristically German sense of superiority toward its less educated neighbor, coupled with a lack of appreciation of the history, the literature and the economic condition of the Old Russia.

The remaining twenty-one chapters are devoted to the aims and the character of the Soviet Government, the Bolshevik Party, its politics, economics, effect upon the family life, the arts, sciences and many other aspects of life. The communist rule is here unmasked once and for all and condemned in toto. One learns that "the bolsheviks are past masters of the art of lying with the aid of statistics." It is not true, the author tells us, that they were principally recruited from ex-convicts; no, the greater majority are fanatics who really believe in their wild tenets. All the so-called achievements of the Soviet rule are a mere "window-dressing" to impress, to hoodwink the outsiders. But what of Mr. Seibert's qualifications which should enable him to observe, to interpret, and to prognosticate upon the ultimate success or failure of this complex and utterly new situation? "He who is not able to speak Russian," so says the author, "he who cannot talk to all without an interpreter, he who has to follow a prescribed line of travel, he who cannot stay in Russia long enough to see through the artifices of the official language—must not expect to observe in Russia anything more than the merest externals whether in good things or in bad." To which the reviewer should like to add one more qualification, namely, that of an approach without a bias, if for no other reason than that the situation in question is utterly new and without a precedent. But Mr. Seibert has a bias, nor does he attempt to conceal it. On the contrary, he states it clearly and emphatically. He does not believe in Socialism. "Socialism is a hot-house plant which cannot thrive in fresh air." Communism, proletarian dictatorship, planned economy, are one thing—socialism. Socialism cannot succeed, and if it could, would enslave us in a society organized on a rigid plan of a vast army—a slave-state. This type of approach vitiates otherwise worth-while observations gathered by Mr. Seibert in the course of his four years sojourn in the land of Soviets as a correspondent for several German papers. The negative aspects of life in U. S. S. R. are unduly stressed and exaggerated, the positive aspects which the author, oh, so grudgingly admits, are glossed over, minimized, or wilfully misinterpreted. Even the recognition of political and cultural freedom for national minorities is derided as a mere "window-dressing," again, to impress the outsiders. Besides, it is not an altogether clever political gesture, for it may lead, for example, in the case of Ukraina to separatist aspirations. The advancing elimination of illiteracy and the spread of higher education, the opening of museums and of arts to the masses of workers, are treated flippantly and are dismissed with the anecdote about the pupil who said that Shakespeare was but another of the great German composers. Mr. Seibert would not, however, have us leave him with an impression that he did not

realize that something was wrong with our world. He is conscious of there being something wrong, but it is not so much the capitalistic system that is at fault, as the individual. He even has a remedy. "We must fight bolshevism. . . . The political alternative to socialism is the promotion of social welfare, the control of morbid outgrowths of capitalism, and the protection of those who are economically weak." The book ends with an impassionate appeal for a return to an enlightened and responsible individualism, to a paternal capitalism, under the shibboleth "ich dien." This would set the world aright or, at least, check the perilous tendency to revolution!

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Leading Articles in Current Legal Periodicals

Tulane Law Review, December (New Orleans, La.)—Lawyer's Law and the Little, Small Dice, by Joseph C. Hutcheson, Jr.; Air Law and Comparative Law, by Francesco Cosentini; International Legal Documentation, by Carl L. W. Meyer.

Notre Dame Lawyer, November (South Bend, Ind.)—Construction of Indiana's $1.50 Tax Law, by Roland Obenchain; State Rights under the Federal Prohibition Law, by John F. Finerty; Should the Federal Government Establish A Bankruptcy Bureau? by Max Isaac; Priorities in the Law of Mortgages, by W. D. Rollison.

Columbia Law Review, November (New York City)—Philosophy and Legal Science, by Morris R. Cohen; Commonwealth v. Hunt, by Walter Nelles.

Yale Law Journal, November (New Haven, Conn.)—Law Enforcement—An Attempt at Social Dissection, by Thurman W. Arnold; The Liability of a Transferor by Delivery and of a Qualified Indorser, by William E. Britton; Interpleader in the United States Courts, by Zechariah Chafee, Jr.

Illinois Law Review, December (Chicago)—The Worm Turns, or a Judge Tries Teaching, by Joseph C. Hutcheson, Jr.; The "New Procedure" of the English Rules, by Robert Wyness Millar; Reflections on Brief Writing, by Arthur C. Bachrach; Federal or State Rules of Evidence in Federal Courts, by Edward C. Sweeney.

Iowa Law Review, November (Iowa City, Ia.)—Federal Equity Jurisdiction to Enjoin Acts of State Officers, by Daniel James; Liberalizing the Volstead Act, by Eugene A. Gilmore; Liability of a Husband for Wife's Torts, by Robert W. Miller; Trusts for Continuing a Decedent's Business, by Francis W. Jacob.

Michigan Law Review, November (Ann Arbor, Mich.)—Non-Assignment Provisions in Land Contracts, by Edwin C. Goddard; Burden of Proof in Rate Cases Involving Inter-Corporate Charges, by William E. Treadway; Legislative Committees and Commissions in the United States, by John A. Fairlie; Comment upon Failure of Accused to Testify, by Robert P. Reeder.

Commercial Law Journal, December (Chicago)—Daniel Webster—The Lawyer, by William I. Schaffer; Law Directories and Law Lists, by Robert A. B. Cook; Why Should Collection Agencies be Permitted to Exist? by H. T. Hamilton.

Journal of Criminal Law and Criminology, including the American Journal of Police Science, November-December (Chicago)—Have our Prisons Failed? by Sanford Bates; The Wickersham Deportations Report by Francis Fisher Kane; A Fiction of the Common Law, by Frank Swancara; A Criminological Laboratory, by Frank Loveland, Jr.; Results of Probation, by Bennet Mead; The United States Probation System, by Joel R. Moore; The Chicago Police Department, by E. W. Puttkammer; Future Development of State Police, by Bruce Smith; Michigan State Police, by Oscar G. Olander.

Dickinson Law Review, November (Carlisle, Pa.)—Literature and the Criminal Law, by Walter H. Hitchler; Undue Influence and Fraud in Wills, by A. J. White-Hutton.

West Virginia Law Quarterly, December (Morgantown, W. Va.)—James Wiggin Simonton; Power of a State to Control the Export of Hydro-Electric Energy, by James W. Simonton; President and Military Power in Emergencies, by Charles McCamic; Right to Trial by Jury in Prosecutions for Petty Federal Offenses, by Melville Stewart.

St. Louis Law Review, December (Fulton, Mo.)—Restatement of the Law of Contracts with Missouri Annotations, by Tyrrell Williams; The Constitutionality of Proportional Representation as Applied to Elections in the State of Missouri, by E. M. Grossman and F. Warner Fischer.

New York University Law Quarterly Review, December (New York City)—The Juridical Nature of the Public Debts of States, by Alexander N. Sack; Are Sales of Corporate Stock Subject to the Sales Act? by Paul D. Kaufman; Capacity for Legation and the Theoretical Basis of Diplomatic Immunities, by Lawrence Preuss; Arizona v. California, by Russell Denison Niles.

Texas Law Review, December (Austin, Tex.)—The Texas Court of Criminal Appeals, by Keith Carter; Trial by Jury in Disbarment Proceedings, by C. S. Potts; Marital Property and the Conflict of Laws, by George Wilfred Stumberg; The Making of the Federal Constitution, by Harry P. Lawther.

Harvard Law Review, December (Cambridge, Mass.)—Extrastate Enforcement of Penal and Governmental Claims, by Robert A. Leflar; The Business of the Supreme Court at October Term, by Felix Frankfurter and James M. Landis; Notes on the Statute of Westminster, 1931, by Manley O. Hudson.

Virginia Law Review, December (University, Va.)—The Extension of Municipal Liability in Tort, by Charles W. Tooke; The Early Years, by Herbert Barry; Taxing the Income of the Federal Judiciary, by Charles L. B. Loundes.

Michigan State Bar Journal, December (Ann Arbor, Mich.)—Annual Address of the President, by H. Clair Jackson; Problems as to Real Estate Bonds, by George E. Brand; Congressional Redistricting and the Constitution, by Harold M. Bowman; The Declaratory Judgment as an Exclusive or Alternative Remedy, by Edwin M. Borchard; What is a "Contract" Under the Contracts Clause of the Federal Constitution? by Paul G. Kauper; Broadening Legal Education, by Edgar Noble Durfee; The Right to Comment on the Failure of the Defendant to Testify, by Andrew A. Bruce.

Yale Law Journal, December (New Haven, Conn.)—From Indictment to Information—Implications of the Shift, by George H. Dession; Instructions to Juries—Their Rôle in the Judicial Process, by R. J. Farley.

Minnesota Law Review, December (Minneapolis, Minn.)—Proposed Federal Regulation of Interstate Carriers by Motor Vehicle, by Karl Stecher; Special Agency, by Basil H. Pollitt.

Illinois Law Review, January (Chicago)—Studies in Foreclosures in Cook County: I. Masters in Chancery, by Homer F. Carey, John W. Brabner-Smith, David V. Lansden; The "Penumbra Doctrine" in Prohibition Enforcement, by Forrest Revere Black; The Effect of Acceptance of an Altered Bill, by Louis M. Greeley.

U. S. Law Review, December (New York City)—The Challenge to the Courts, by James H. Wilkerson.

North Carolina Law Review, December (Chapel Hill, N. C.)—The Report of the North Carolina Constitutional Commission; Proposals for Legislation in North Carolina.

Marquette Law Review, December (Milwaukee, Wis.)—Damages, Responsibility and Loss of Profits, by Vernon X. Miller; Occupational Taxes, by H. William Ihrig; Diversity of Citizenship as Applied to Corporations, by Lawrence F. Daly; History of Legislative Control of Monopolistic and Discriminatory Trade Practices in Wisconsin, by William B. Crow.

Canadian Bar Review, December (Toronto, Ont.)—Tort Liability of Manufacturers, by F. C. Underhay; Rules of the Road at Sea, by S. A. Smith; Cause in Law and Metaphysics, by H. S. Patterson.

PROBLEMS IN UNIFORM MECHANICS' LIEN ACT

Controversial Nature of Subject Matter Due to Divergence of Interest of Various Groups Concerned in a Building Enterprise—Attaching Date of Lien—Enforcing Lien Claims "Off the Record"—Penal Provisions—Argument for Provision Permitting Owner and Contractor to Agree That No Liens Should Be Filed Rejected—Other Problems Solved—The Act as a Whole

By Charles V. Imlay

Chairman of Committee on Uniform Mechanics' Lien Act of National Conference of Commissioners on Uniform State Laws

WHEN the National Conference of Commissioners on Uniform State Laws at its October meeting in Washington approved the Uniform Mechanics' Lien Act, (which was at the same time approved by the American Bar Association), it brought to a conclusion a task upon which it had continuously labored with a cooperating committee in the Department of Commerce for almost eight years, completing the text of an act which has perhaps involved as many controversial matters as any subject considered by the Conference. The history of the draft and a discussion of the principles embodied therein are printed with the official text thereof in a pamphlet just issued by the Secretary of the Conference.

Act Joint Product of Committees of Department of Commerce and Conference

The preparation of the Uniform Mechanics' Lien Act had its origin in the Department of Commerce where early in the year 1925 Herbert Hoover, then Secretary of Commerce, appointed a committee including representatives of the leading organizations of owners, contractors, subcontractors, materialmen, laborers, surety companies, and other organizations affected, for the purpose of considering a "Standard State Mechanics' Lien Act."[1] A cooperating committee of the National Conference was designated by the latter at the same time. The two committees have worked together continuously since that time. Frequent sessions of the Department Committee have been held in Washington over this entire period. Numerous meetings of the Committee of the Conference have been held over the same period. The two committees have on a number of occasions met in Washington for joint sessions. Mr. Dan H. Wheeler of the Department of Commerce, the Secretary of the Department Committee, has been throughout the chief draftsman of the act, and has always been in close contact with both committees and the numerous organizations interested in the work. The final completion of the work and the agreement between the two committees have been due in a great measure to Mr. Wheeler's industry and the tactful manner in which he has presented to those interested the difficult problems involved in the work and aided in their solution. The contact between the two committees has also been furthered by the fact that the Chairman of the Conference Committee has throughout been a member also of the Department Committee.

Beginning with a first tentative draft of the proposed law, based upon the draft first formulated by the Department Committee, submitted to the Conference at its Denver meeting in 1926, successive drafts have been presented each year, the sixth tentative draft having been presented and considered in full at the Forty-first Annual Conference of the Commissioners at Atlantic City in September, 1931. At that Conference the act was tentatively approved with the proviso that it should lie over for final adoption at the 1932 session of the Conference. In the interval between the two sessions both committees have worked towards the perfection of certain matters of form and phraseology so that the final draft, approved by the Conference and by the American Bar Association at their sessions in Washington, D. C., in October, 1932, may be said without qualification to represent the best efforts of all who have worked upon the draft and the utmost deliberation on the part of the Conference as a whole.

In the course of the work of the two committees mentioned, very extensive circularization has been made of all interests affected. Thousands of copies of tentative drafts have been printed by the Committee of the Department of Commerce and by the Conference and sent to groups interested, and numerous hearings have been held by both committees, at which representatives of various in-

1. The present membership of the Department Committee with the location of its members and their respective organizations are: F. Highlands Burns, Baltimore, Md., President, Maryland Casualty Company; William F. Chew, Baltimore, Md., Ex-President, National Association of Builders' Exchanges; Charles V. Imlay, Washington, D. C., National Conference of Commissioners on Uniform State Laws; C. Clinton James, Washington, D. C., Ex-President, U. S. Building and Loan League; Stewart A. Jellett, Philadelphia, Pa., Ex-President, Heating and Piping Contractors' National Association; Gerhardt F. Meyne, Chicago, Ill., Associated General Contractors of America; Victor Mindeleff, Washington, D. C., American Institute of Architects; Charles H. Paul, Dayton, Ohio, American Engineering Council; William C. Roberts, Washington, D. C., Chairman, Legislative Committee, American Federation of Labor; W. T. Rossiter, Cleveland, Ohio, Ex-President, National Builders' Supply Association; E. W. Shepard, New York, N. Y., National Association of Credit Men; Frank Day Smith, Detroit, Mich., National Retail Lumber Dealers' Association. Messrs. Austin J. Lilly and Clapham Murray, Jr., of Baltimore, have been active associates of Mr. Burns, contributing much valuable help on the bonding features of the act. Mr. Earl Ross of Cleveland and Mr. L. W. Wallace of Washington, D. C., have been active and helpful associates respectively of Messrs. Rossiter and Paul. Mr. Roberts as representative of the American Federation of Labor took the place of George F. Hedrick, deceased. Mr. William B. King of Washington, D. C., the able and beloved general counsel of the National Association of Builders' Exchanges, sat continuously with the committee until his death in 1930. Mr. Ward P. Christie acted continuously as an associate of the representative of the Associated General Contractors. Dan H. Wheeler, of Washington, D. C., has been secretary of the committee continuously from its organization.

terests have been given an opportunity to express their views.

Controversial Nature of Subject Matter

In presenting the act to the American Bar Association Judge William M. Hargest, President of the Conference said:

"The interests of the various groups affected by a mechanics' lien act are necessarily divergent. The difficulty of reconciling these interests is correspondingly difficult. The Conference has attempted to reconcile these differences so far as is possible and to frame an act that will do justice to all. It has endeavored to safeguard the interest of the owner at every step and at the same time to accord to the contractor, the subcontractor, the materialman and the laborer a facility for filing and proving their liens so as to give security to them upon the land to which their work and materials are furnished."

This divergence of interests of the various groups concerned in a building enterprise is what makes the problems. The owner of course would prefer no liens, the contractor naturally takes kindly to a lien to enforce his rights against the owner, but feels the restrictions of the lien machinery when set into play by subcontractors, materialmen and laborers. These classes whose claims are derived through the contractor (so-called derivative claimants) need the lien probably more than others. Their claims, however, place them in positions adverse both to contractor and owner. And when we have passed from a consideration of owner, contractor, and derivative claimants, we have other large and important interests affected by a mechanics' lien law, e. g., banks, building associations, and other lending organizations; bonding and surety companies; and insurance companies, particularly title insurance companies. In addition, there are professions related to that of the builder like the engineer, the architect, and the landscape architect, all of whose interests are involved.

Attaching Date of Lien

At the outset of the discussions before the National Conference in the meeting in Denver in 1926, the question was raised as between the rule of having the lien an inchoate right dating back to the visible commencement of operations or having the lien date as of the time of recording. Choice of the former rule was made in accordance with the prevailing rule in this country. The draftsmen of the act did not overlook the practical value of the recording date as the effective date of the lien from the standpoint of investors and title searchers. The interests of the latter were earnestly presented and were just as earnestly considered. But it was believed that wholly apart from the consideration of prescribing the majority rule in the states (a weighty consideration in drafting any uniform state law) the rule of placing liens on a parity as of the date of visible commencement (with proper exceptions in favor of certain priorities) is more equitable. It eliminates the unfairness of preferring the man who can run the fastest to the recorder's office. And the pro rata division which results is in line with practice in other fields of the law, e. g., distribution of bankrupt assets and the funds of a decedent's estate.

Enforcing Lien Claims "Off the Record"

How far may a mechanics' lien law go in permitting consideration for derivative claimants (meaning thereby, as indicated above, those like laborers, subcontractors, and materialmen who deal with the contractor or subcontractor) to dictate the time and method of payments by owner to contractor?

The above question suggests the problem which deadlocked the draftsmen of the act for most of the years that the subject of the draft of the Uniform Act was under discussion. It was about this point in the varying drafts from year to year that broadsides came first from one hand and then from another according to whether the particular draft leaned toward a drastic tying up of payments or liberality in permitting payments as between owner and contractor. On the controversy thus aroused figuratively speaking much blood was shed.

For example, the draft as presented to the Buffalo Conference in 1927 sought to meet the situation by requiring that whenever any payment is to be made by the owner to the contractor, the latter shall furnish to the owner a statement under oath showing the names of derivative claimants and the amounts of their claims, which amounts might then be retained by the owner to abide the determination of the validity of the claims. (That draft also embodied, as did the first in 1926, the provision which remains in the final draft, and which permits the derivative claimant by an informal notice to the owner to stop the amount of the claim in the owner's hands to abide, if necessary, the final filing of the lien in the court record). The attempt, as the contractors saw it, to make the owner the disbursing agent, to deprive them, as they contended, of the right to receive money from the owner and disburse it as any other business man would, was going too far, they said, in "ham-stringing" the contractor. They saw in it too radical a departure from the typical state statute which leaves to the derivative claimant when he files his lien in court the chance of getting what might be due him from a possible balance in the hands of the owner not yet paid to the contractor. And so the contractors protested and quite emphatically.

With a view to meeting the objections from contractors, the draftsmen next proposed (in the draft presented at Seattle in 1928), in lieu of the sworn statement by the contractor upon the occasion of each payment by the owner, such a sworn statement upon the final payment, a reserve of ten per cent to be withheld until the final payment. Then arose a protest from materialmen and other derivative claimants and the spilling of as much printer's ink as had been spilt the previous year by the contractors. The basic purpose of the act, they said, was lost. The owner may now, they said, pay the contractor and the contractor may spend money which in good conscience belongs to derivative claimants, except for the insufficient ten per cent.

During the impasse thus created between the two rival groups the Conference was at one time quite near to abandoning the task of drafting the act and discharging the committee. But fortunately at the moment when the situation looked the darkest a compromise was reached in provisions summarized in notes to the official draft as follows:

"Lien claimants whose claims are derived through the contractor, i. e., subcontractors, and materialmen, may by an informal notice in a form prescribed by the act (without a resort

to the formal record claim of lien), require the owner to retain funds in his hands for satisfaction of claims. If, however, the debt is not paid pursuant to said notice, a formal claim of lien must be filed in court according to usages now prevailing. Laborers are accorded similar protection without the necessity of such an informal notice, but if not paid must file the formal claim of lien to subject the real property to liability. Priority in payment of the funds covered by the informal notice referred to is given (after a first priority to laborers) to those who give the owner their notices while still rendering services but within thirty days of beginning to do so, but those not giving such notices are not deprived of the right thereafter to file for record a formal claim of lien. Though he is not required to do so, the owner may, as the work progresses, make payments to laborers at any time without requirement of the aforesaid informal notice; to claimants who give that notice within the limited time provided enough money is in hand to satisfy laborers and lienors previously giving notice within the limited time; and he may make such progress payments to lien claimants who give such notice after the limited time or who do not give such notice, provided he retains sufficient funds to cover amounts due all laborers and amounts included in notices previously or thereafter given."

The provision for a statement under oath by the contractor at the time of the last payment by the owner still obtains.

Penal Provisions

The act makes the fraudulent misapplication of proceeds of a building loan, that is, payment to others than those engaged in the particular building enterprise, a crime. This was the conclusion of a controversy in which the alternative offered to the penal provision was an enactment making the money a "trust fund." The proponents of the criminal provision, however, prevailed, as they did in the other provision of the act making the fraudulent furnishing of a false statement a crime. But they were induced to concede the elimination of the drastic rules making a misapplication and misstatement *prima facie* fraudulent, as provided in former drafts.

"No Lien" Argument

Whether or not the act should contain a provision permitting owner and contractor to agree (subject to the agreement being publicly recorded) that no liens should be filed by any engaged in the enterprise, was another bone of contention. The provision was rejected in view of the complete procedure set up for a bond to be given by the contractor to the owner to relieve the land from liability for liens. The lien machinery, however, is retained for proving lien claims, determining priorities and solving other questions covered by the act: a final decision by the draftsmen as against the opposing view of making the remedy on the bond independent of the machinery of the act.

Other Problems Solved

Brief reference may be made to the following other solutions of problems raised:

Application of lien claim to demolition as well as construction.

Limitation of the term "subcontractor" to a subcontractor of the subcontractor, that is, a limitation to a subcontractor in the second degree.

The inclusion of architects, landscape architects, and engineers in the scope of protection afforded by the lien.

A definite priority in favor of laborers, who, as pointed out above, have such priority without the requirement of the informal notice mentioned.

The requirement that the owner or contractor making a payment to a derivative claimant with whom he has several accounts must designate the account to which the payment should be applied, and other similar requirements between those engaged upon a building enterprise.

The privilege given a materialman to repossess himself of materials delivered but not used in the building operation.

The rule that lien liability for improvements ordered by a husband or wife who are co-owners of land is binding upon the other in the absence of objection, when the other spouse has knowledge that the improvements have been ordered.

The Act as a Whole

What has thus far been said relates to the main controversial matters involved. The text just issued indicates a variety of other matters not in their nature controversial but incorporations of legislative precedents found elsewhere and the broad experience of the group of experts engaged in the work. It may be said of the act as a whole that it has had more than the ordinary amount of consideration by technicians, who in the main make up the department committee and more than the usual amount of attention from lawyers who make up the conference committee. It is believed that a reading of the act will reveal a large amount of very rich material furnished by technical men on the department committee which could not have been furnished by men who were only lawyers. The act therefore anticipates by way of specific legislative enactment many questions that otherwise would have to be arrived at by what is known sometimes as the "coral-reef" method of judicial decision. This may justify in a measure the length of the act which as printed by the Conference is thirty-four octavo pages. On the other hand it is confidently believed that the skilled work that has been put on the drafting of the act by the lawyers of the Conference insures a draft of more than ordinary value from a legal standpoint. It is not meant, however, that there was any exact division of duties between the two committees in this way.

The above considerations will commend the act to the state legislatures to which it has now been recommended for adoption. "Taking into account," as Judge Hargest also said on the occasion mentioned, "the peculiar conflicts in interest existing between the parties concerned, it is believed that the provisions of the Uniform Mechanics' Lien Act come as near as possible to satisfying and protecting the relative rights of the parties, and in view of widely prevailing differences in legislative practice the act comes as nearly as possible to uniformity."

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JURISDICTION ON FEDERAL COURTS IN DIVERSE CITIZENSHIP CASES

(*Continued from page 76*)

of the federal courts in diverse-citizenship cases, by which possible abuses in the state administration of justice can be in some measure corrected; no one proposes to supersede the state jurisdiction in such instances. But even this question puts in issue not only the facts but also the most fundamental criteria as to the administration of justice. For this reason as well as because a critical comparison of state and federal courts tends to seem invidious, the theoretical analysis of the problem has normally hedged on the fundamental issue, whether state justice alone affords a trial jurisdiction sufficient for national needs. On this ground, it will be recalled, there was stout objection to the Constitution in the debates as to its adoption, but, as the clear intendment of the Constitution is to provide for a system of inferior federal trial courts,[30] it has been infrequently asserted in recent years that the trial of causes in the federal courts in the first instance should be limited to the categories of original jurisdiction vested in the Supreme Court by the Constitution, and the inferior federal courts accordingly abolished.[31]

However, from the point of view of the adequacy of the state courts, certain considerations as to the diverse-citizenship jurisdiction have been urged: first, that "the State should be supreme in the settlement of controversies which may arise under its statutes,"[32] which, as we have seen, begs the question; second, that there has been sufficient improvement in the state courts since the enactment of the Constitution to justify the elimination of the concurrent federal jurisdiction as unnecessary; third, that the reform of abuses in the state courts is retarded by allowing important classes of litigants access to the federal courts; fourth, that the federal courts themselves, because of the practices as to the appointment of federal district judges, are prejudiced in favor of corporate interests and hence improper tribunals. Incidentally, it will be observed that the second and third points tend to answer each other, while the fourth is an argument rather for the reform of such abuses as have crept into the appointment of federal district judges under cover of what is politely called senatorial courtesy, than for the denial of a federal jurisdiction which even under existing conditions is not shown to be undesirable.

In opposition to the foregoing argument, attention has been called to certain aspects of the administration of justice in the federal courts as a result of which a trial in the federal court is advantageous, namely, the life tenure of the judge, his powers to charge on the law, to comment on testimony and to direct or set aside verdicts according to the course of the common law, all of which is in contrast to the situation of the judges in the courts of many states, frequently elected for a short term, and shorn of one or another of the powers exercised by the federal judge under the Constitution. The calibre of not only the federal judiciary, but also of the juries in the federal courts is said to be superior to the standards prevailing in many of the state courts. Consequently, it is pointed out, the federal jurisdiction is necessary, not merely in order to give the non-resident in such states an efficient and independent trial of his cause, but even to assure him a trial by jury as guaranteed by the Constitution.

The mere statement of these opposed views exhibits the predicament of theory in such welter of opinions. Not only are the available facts unrepresentative and vaguely formulated, but there are no established criteria by which to estimate their significance. For instance, it is not yet possible satisfactorily to judge: whether an appointive is better than an elective judiciary, or under what circumstances; whether the traditional common law powers of the judge over the evidence promote justice; or indeed, whether the hallowed institution of trial by jury itself has become an anachronism under modern conditions. And as for the possibility of measuring in any scientific manner the efficiency or impartiality or practicality of justice in the state courts, or of determining what the standards of federal as distinguished from local justice may be, so as to ascertain whether state courts are sufficient for national purposes, this is remote; we do not even know in any adequate way what transpires in the name of justice in the courts.[33] Thus, on the crucial question,—whether the conditions of the administration of justice in this country require a federal trial jurisdiction in diverse-citizenship cases, there appears no present basis for a scientific solution. It is this situation which permits honest difference of opinion about rudimentary issues and lends to the hypotheses of theory hypnotic charm.

It remains to consider a fourth argument, namely, that the proposed repeal of the federal trial jurisdiction in controversies between citizens of different states is unconstitutional. This argument, at least as urged in the hearings in the recent session of Congress, was not happily formulated in three respects. First, it did not discriminate between possible meanings of the term, "unconstitutional"; second, it failed to emphasize essential aspects of the case; third, it involved a too formal theory of constitutional interpretation for legislative purposes.

At the very outset, a failure to distinguish between the possibility of judicial review, the constitutional powers of Congress, and its constitutional duties embarrassed the argument. In the

30. The Federalist, No. LXXX. (1788). See also the opinion of Story J. in Martin v. Hunter's Lessee, 1 Wheat 305, (1816), referred to in Note 34 infra.

31. In an interesting article in the New York Sunday Times, April 23, 1922, at p. 5, Senator Norris has suggested that the inferior federal courts should be abolished, chiefly on the ground of the cost to the government and to private litigants involved in duplication of jurisdictions and because of the supposed discrimination between rich and poor litigants resulting from the present system.

32. Op. cit. supra, note 9, p. 2.

33. For further comment on this aspect of the situation, see my article, The Purview of Research in the Administration of Justice, 16 Iowa Law Review, 337. (April, 1931.)

specific sense of the term, the contention that proposed legislation is "unconstitutional" should lay a basis for the prediction that such legislation will be declared void by the courts. This requirement the argument failed to meet: first, it produced no authority and was contradicted by a recent and explicit dictum of the Supreme Court on the question;[34] second, it encountered the suggestion that since the First Judiciary Act Congress has in practice regulated the diverse-citizenship jurisdiction by fixing a minimum jurisdictional amount; third, the argument was finally driven to the position that "the right of removal from a State to a Federal Court is an exercise of appellate jurisdiction,"[35] which, therefore, under the Constitution, shall be exercised "with such exceptions," as the Congress shall make. This construction of course did not require original jurisdiction to be vested in the federal courts in diverse-citizenship cases and in effect gave the argument away.

It is more pertinent, therefore, to consider the "constitutionality" of the proposed legislation by inquiring whether Congress is under a constitutional mandate to provide an original federal jurisdiction in controversies between citizens of different states, irrespective of enforceability by proceeding in court.[36] Stated, in this sense, the argument urged in the hearings in the recent session of Congress, that the definition of the federal judicial power in the Constitution is a "constitutional grant" and not a "legislative discretion," becomes more plausible. This construction was based specifically upon the precedent of the Eleventh Amendment, from which it was inferred that, although Congress possessed the power reasonably to regulate the federal jurisdiction between citizens of different states, its "repeal" could not properly be accomplished by Congressional legislation.

Measured by the canons of documentary interpretation, however, this argument did not cogently set forth the purposes of the federal jurisdiction in question in relation to other constitutional provisions. It will be sufficient for present purposes to sketch certain of the considerations involved in this suggestion. In Article IV, section 2, of the Constitution, it is provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." According to Hamilton's conception, the jurisdictional provisions in the Constitution, and, more particularly, the federal diverse-citizenship jurisdiction, are to be regarded "primarily as the procedural machinery for effectively securing the substantial rights conferred by the privileges and immunities clause."[37] One way of testing this construction is to inquire whether the constitutional guarantee in the privileges and immunities clause will be emasculated by the abolition of the original federal jurisdiction. It has been suggested to the contrary that adequate remedy for discriminatory decisions in the state courts is provided by writ of error under the privileges and immunities clause.[38] On this, however, is to be remarked that the federal judicial review of state legislative or judicial acts would seem to have been in effect limited by the Supreme Court to the grosser types of legislative or judicial offenses against the Constitution. It is very doubtful, in view of the decisions under the Fourteenth Amendment, whether the federal courts will undertake the appellate review of state judicial decisions, even if discriminatory, under the privileges and immunities clause in Article IV.[39] And the most frequent and important types of cases would not be provided for by writ of error under this clause, so long as foreign corporations, not engaged in interstate commerce, are anomalously not regarded as "citizens" for its purposes.[40] Furthermore, it is a serious question, whether the Supreme Court alone, as at present constituted and not aided by the inferior federal courts, even if it were willing, could effectively undertake to review the decisions of the state courts, charged with exclusive original jurisdiction in controversies between citizens of different states, in respect either of general law or much less of the findings of fact by judge or jury, except in obvious and sporadic instances of failure of due process. Under such a system, save in such cases, the enforcement of the privileges and immunities clause would be left to the courts of the states against the official acts of which it was designed as a protection. These considerations suggest, if it may be assumed that it is not competent for Congress to regulate the administration of ordinary civil justice in the state courts,[41] that the drastic limitation or abolition of the federal diverse-citizenship jurisdiction would to that extent impair the constitutional guarantee in the privileges and immunities clause.

In concluding the consideration of this aspect of the matter, it may be observed that the argument on the point of constitutionality ended, as it began, with the statement of a formal theory of the precedents. In this, it is to be feared, lay its fundamental weakness. It did not adequately conceive the prob-

34. Kline v. Burke Const. Co. 260 U. S. 226. (1922). See the remarks on pp. 233-234:

"The right of a litigant to maintain an action in the Federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. The applicable provision, so far as necessary to quote it here, is contained in Article III; section 1 of that article provides: 'The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish.' By section 2 of the same article it is provided that the judicial power shall extend to certain designated cases and controversies, and, among them 'to controversies . . . between citizens of different States . . .' The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases of controversies, but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdictions at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

35. Op. cit. supra, note 8, p. 8. Particular reliance was placed upon the opinion of Story, J. in Martin v. Hunter's Lessee, 1 Wheat 305. (1816). It will appear, however, from an attentive examination of the opinion, that two alternative views were suggested, viz.—

(a) "In respect to the first class; (in which under Article III of the Constitution, the judicial power shall extend 'to all cases'), it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases; and in the latter class, ('controversies'), to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." p. 334.

(b) "But there is, certainly, vast weight in the argument which has been urged, that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority." p. 336.

As the opinion did not finally choose between these two constructions, the dictum is scarcely an authority in favor of the view for which it was apparently cited.

36. That a mandate to Congress may reasonably be inferred from the Constitution and yet be unenforceable by any proceeding in the federal courts, is a quite possible situation for which there is no precise epithet and which is perhaps most strikingly illustrated by the recent history of the decennial apportionment of representatives, enjoined upon Congress in the Constitution.

37. Henderson. The Position of Foreign Corporations in American Constitutional Law, (1918), 183. See The Federalist, LXXX, (1788).

38. See Warren, op. cit. supra, note 21, 83; Friendly, op. cit. supra, note 27, 485, 492 n.

39. Cf. Patterson v. Colorado, 205, U. S. 454. (1907.)

40. Paul v. Virginia, 8 Wall. 168, 178. (U. S. 1869.)

41. E. g. Chase J., in Calder v. Bull, 3 Dall, 386, 387. (1798.)

lem of constitutional interpretation. Nor was it entirely appropriate to the occasion; it did not realize that Congress is not quite a court and by mere legalism prejudiced its cause. Both in legislation and constitutional interpretation, what has been is of vast importance; in the one case, as an indication of what may be, in the other, to illumine the purposes of what has been written. But, from either point of view, the logic of the precedents which restricts itself to the traditional meanings of words, is not enough. What needs also to be shown is that the theory advanced is specifically adapted to the conditions to which it is to be applied. Hence, for legislative purposes, the formal constitutional argument suggested an hypothesis which it did not prove.

(To be continued in the next issue.)

Washington Letter

1266 National Press Bldg.,
Washington, D. C., Jan. 11, 1933.

Declaratory Judgments

THE House of Representatives, on December 19, 1932, passed H. R. 4624, to amend the Judicial Code by adding a new section to be numbered 274 D. This bill is known as the Declaratory Judgment bill, and as passed by the House, provides:

"That the Judicial Code, approved March 3, 1911, is hereby amended by adding after section 274C thereof a new section to be numbered 274D, as follows:

"'Section 274D. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"'(2) Further relief based on a declaratory judgment or degree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"'(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

The bill was referred in the Senate to the Senate Judiciary Committee on December 20th and on December 21st that committee referred the bill to a subcommittee composed of Senators King, Austin, and Walsh.

Appointment of Secretaries to United States Circuit and District Judges

On December 12, 1932, Senator Glenn introduced S. 5142, providing:

"That each United States circuit and district judge is hereby authorized to appoint a secretary, with compensation to be fixed by the Attorney General, subject to the provisions of the Classification Act, as amended, and subject to the restrictions of section 67 of the Judicial Code, as amended.

"Section 2. The headquarters of each secretary shall be fixed at the place where the major portion of his duties are to be performed, and when absent from headquarters for the purpose of attending court he shall be allowed his expenses of travel and subsistence, when authorized or approved by the Attorney General.

"Section 3. The appropriation of such amount as may be necessary to pay the salaries and traveling expenses of said secretaries is hereby authorized: Provided, however, that until a special appropriation is made said salaries and expenses shall continue to be paid from the appropriation for miscellaneous expenses, United States courts."

The bill was referred to the Senate Judiciary Committee. A similar bill was introduced in the House of Representatives by Representative Reid of Illinois (H. R. 13304) and was referred to the House Judiciary Committee.

Appeal from District Courts of Alaska

On December 29, 1932, Representative Wickersham introduced H. R. 13954, to provide for appeal or writ of error from final judgments in the district courts of Alaska to the United States Circuit Court of Appeals. The measure, which was referred to the House Judiciary Committee, provides:

"That the United States Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions from the district courts for Alaska or any division thereof in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved, in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000, and in all habeas corpus proceedings."

Interstate Compact Bill for Conservation of Oil and Gas

On December 21, 1932, Senator McGill introduced S. 5258, for the conservation of oil and gas and protection of American sources thereof from injury, correlation of domestic and foreign production, and consenting to an interstate compact for such purposes. The measure, which was referred to the Senate Judiciary Committee provides:

"That the consent of the Congress of the United States is hereby given to an agreement or compact between any two or more of the oil-producing States" whereby,

"Said States may agree upon uniform principles and for enactment of laws in their respective States for the conservation of oil and gas and the prevention of premature exhaustion of American sources of supply, including provisions affecting any or all of the following objectives:

"(1) Requirement of the most effective and economic use of reservoir energy.

"(2) Equitable apportionment of the contents of a common source of oil or gas.

"(3) Regulation and control of drilling, producing, and operation methods, so as to promote maximum ultimate economic recovery.

"(4) Retention underground of oil and gas whose production would be in excess of transportation or marketing facilities or reasonable market demand, and when required to preserve the oil pools of settled production.

"(5) Prohibition of waste of all kinds, both physical and economic, whether occasioned by breach of the foregoing objectives or otherwise.

"(6) Ratable taking of production of oil and gas from competing fields and from wells within the same field.

"(7) Authorizing unit operation of a single oil or gas field or area."

The bill further provides that the States may agree to establish,

"a Federal-Interstate Oil Conservation Board, one of whose members shall be appointed by each of the compacting States and one of whose members shall be appointed by the President."

The Powers of such Board are enumerated. Section 2 of the bill provides:

"The oil and gas conservation laws of the States, whether now or hereafter enacted, in so far as they effect the objectives set forth in section 1 (a) of this Act or any recommendations or agreements made pursuant to section 1 (b) of this Act,

shall not be deemed an unwarranted interference with commerce with foreign nations and among the several States."

The bill was, on December 27th, referred to the Secretary of the Interior, the Secretary of the Treasury, the Attorney General, and the Federal Oil Conservation Board, for reports.

Suspension of Annual Assessment Work on Mining Claims

On January 9, 1933, Senator Patterson, from the Committee on Mines and Mining, submitted a favorable report (Senate Report No. 1019), with amendment, on S. 5137, introduced by Senator Borah, providing for the suspension of annual assessment work on mining claims held by location in the United States and Alaska. The measure, as amended by the Senate Committee, provides:

"That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining Claim located, and until a patent has been issued therefore, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States, including Alaska, during the year beginning at twelve o'clock meridian July 1, 1932 and ending at twelve o'clock meridian July 1, 1933: Provided, That the provisions of this Act shall not apply in the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1932; Provided further, That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before twelve o'clock meridian, July 1, 1933, a notice of his desire to hold said mining claim under this Act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1932."

Executive Orders Grouping, Coordinating, and Consolidating Certain Executive and Administrative Agencies of the Government

On December 27, 1932, Representative Cochran, of Missouri, introduced H. Res, 334, providing:

"That pursuant to the provisions of Section 407 of the Legislative Appropriation Act for the fiscal year ending June 30, 1933, the several Executive orders grouping, coordinating, and consolidating certain executive and administrative agencies of the Government, as set forth in the message of the President to the Congress, dated December 9, 1932, and printed in House Document Numbered 493, Seventy-second Congress, second session, are hereby disapproved."

The resolution was referred to the Committee on Expenditures in the Executive Departments, and on January 9, 1933, that Committee submitted a report (House Report No. 1833) recommending that the Resolution be adopted by the House of Representatives. A minority report was made on behalf of five members of the Committee. If either branch of the Congress does not nullify the executive orders issued by the President they will automatically become effective 61 days from date of submission to the Congress, which was December 9, 1932.

The report of the majority of the Committee concludes with this recommendation:

"It is believed that the pending Executive orders should not be permitted to become operative but should be regarded as recommendations made by the President for the assistance and the consideration of Congress; that they should form the basis for continued study of this difficult problem; that other suggestions be invited, and that from all such suggestions and recommendations there be worked out a reorganization program, following the general policy announced by Congress through the provisions of the economy law, with measures and supporting data in such detail as will enable Congress to know what it is doing and to legislate in the light of the facts. It is therefore recommended that House Resolution 334 be passed, thus disapproving the Executive orders submitted to the Congress on December 9, 1932."

Revision of Bankruptcy Laws—President's Message

On January 11, 1933, President Hoover transmitted the following message to Congress, relative to revision of the Bankruptcy Laws:

"To the Senate and House of Representatives:

"On February 29th last I addressed the Congress on the urgent necessity for revision of the bankruptcy laws, and presented detailed proposals to that end. These proposals were based upon most searching inquiry into the whole subject which had been undertaken by the Attorney General at my direction. While it is desirable that the whole matter should be dealt with, some portions of these proposals as an amelioration of the present situation are proving more urgent every day. With view to early action, the department, committees and members of the Congress, have been collaborating in further development of such parts of these proposals as have, out of the present situation, become of most pressing need. I urge that the matter be given attention in this session, for effective legislation would have most helpful economic and social results in the welfare and recovery of the nation.

"The process of forced liquidation through foreclosure and bankruptcy sale of the assets of individual and corporate debtors who through no fault of their own are unable in the present emergency to provide for the payment of their debts in ordinary course as they mature, is utterly destructive of the interests of debtor and creditors alike, and if this process is allowed to take its usual course misery will be suffered by thousands without substantial gain to their creditors, who insist upon liquidation and foreclosure in the vain hope of collecting their claims. In the great majority of cases such liquidation under present conditions is so futile and destructive that voluntary readjustments through the extension or composition of individual debts and the reorganization of corporations must be desirable to a large majority of the creditors.

"Under existing law, even where majorities of the creditors desire to arrange fair and equitable readjustments with their debtors, their plans may not be consummated without prohibitive delay and expense, usually attended by the obstruction of minority creditors who oppose such settlements in the hope that the fear of ruinous liquidation will induce the immediate settlement of their claims.

"The proposals to amend the Bankruptcy Act by providing for the relief of debtors who seek the protection of the court for the purpose of readjusting their affairs with their creditors carry no stigma of an adjudication in bankruptcy, and are designed to extend the protection of the court to the debtor and his property, while an opportunity is afforded the debtor and a majority of his creditors to arrange an equitable settlement of his affairs, which upon approval of the court will become binding upon minority creditors. Under such process it should be possible to avoid destructive liquidation through the composition and extension of individual indebtedness and the reorganization of corporations, with the full protection of the court extended to the rights and interests of creditors and debtors alike. The law should encourage and facilitate such read-

justments, in proceedings which do not consume the estate in long and wasteful receiverships.

"In the case of individual and corporate debtors all creditors should be stayed from the enforcement of their debts pending the judicial process of readjustment. The provisions dealing with corporate reorganizations should be applicable to railroads, and in such cases the plan of reorganization should not become effective until it has been approved by the Interstate Commerce Commission.

"I wish again to emphasize that the passage of legislation for this relief of individual and corporate debtors at this Session of Congress is a matter of the most vital importance. It has a major bearing upon the whole economic situation in the adjustment of the relation of debtors and creditors. I therefore recommend its immediate consideration as an emergency action."

Bills on Bankruptcy Introduced

Numerous Bills have been introduced recently on this subject, among which are the following:

S. 5322, introduced January 4th, by Senator Grammer, providing for the temporary suspension of legal actions and proceedings in civil transactions, the bill, if enacted, to be known as the Domestic Moratorium Act of 1933.

S. 5360, introduced January 9th by Senator Bulkley, to amend the Bankruptcy Act by adding at the end of Section 63, Chapter VII, the following:

"(c) An adjudication in bankruptcy shall constitute an anticipatory breach, as of the date of the filing of the petition, of all contracts of the bankrupt involving financial obligations on his part, which are executory in whole or in part, including unexpired leases of real and personal property, and the holders of such contracts may prove against the estate in accordance with paragraph (b) of this section, any claims they may have, as of the date of the filing of the petition in bankruptcy, for damages for such breach, and such claims may be allowed provided such holders of such contracts have not terminated the same by forfeiture, reentry, or the like, and provided such contracts have not been assumed and adopted by the receiver or trustee. The receiver or the trustee may, with the approval of the court and upon notice to the obligees thereunder, assume and adopt for the benefit of the estate all executory contracts of the bankrupt. In any event, a discharge of the bankrupt shall release him of all liability under such executory contracts, including leases of real or personal property, except as otherwise provided in section 17 of this Act.

A similar bill (H. R. 14062) was introduced in the House of Representatives on January 5th by Representative Celler.

H. R. 13955, introduced December 29th by Representative McKeown, who subsequently and on January 10th introduced H. R. 14133. Mr. McKeown's bills propose to repeal sections 12 and 13 of the Bankruptcy Act and to add a new chapter, number VIII, entitled "Provisions for the Relief of Debtors." Under this bill, courts of bankruptcy would exercise original jurisdiction in proceedings for the relief of debtors through compositions and extensions and corporate reorganizations as provided for in the bill.

The Senate Judiciary Committee has prepared a Committee print of a similar bill, but the bill has not yet been introduced in the Senate.

H. R. 13958, introduced by Representative La Guardia, on December 29th. Representative La Guardia subsequently, and on January 9th introduced H. R. 14110. The purpose of these measures is to provide for railroad reorganizations.

LETTERS OF INTEREST TO THE PROFESSION

The Scottsboro Case as Argument for Public Defenders

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

Judge Sutherland's opinion in the recent reversal by the United States Supreme Court of the conviction of seven Negroes at Scottsboro, Alabama, who received the death penalty for the crime of rape, strikingly illustrates the possibility in extreme criminal cases, of "judicial murder." The facts stated therein also demonstrate clearly the absolute need for the creation of Public Defenders by law, throughout this country, for the proper defense of poor persons accused of crime.

No more glaring or outrageous instance of "railroading" accused persons to a speedy death sentence, can be imagined than is presented by this "Scottsboro case."

Judge Sutherland's opinion shows that the defendants had no money to employ their own counsel; that they were not asked when arraigned for pleading whether they wished to have counsel appointed by the Court; that the vital matter of counsel to the accused in these capital cases was disposed of by the Trial Judge in a "casual fashion"; that "until the very morning of the trial, no lawyer had been named or definitely designated to represent the defendants"; that the action of the Trial Judge, concerning the appointment of counsel, was little more than an "expansive gesture, imposing no obligation on anyone"; that the accused during the most critical period of the cases did not "have the aid of counsel in any real sense" and that the failure of the Trial Judge to give them reasonable time and opportunity to secure counsel or to assign counsel to them, was a denial of due process of law.

Quite apart from the guilt or innocence of the defendants (and I do not concern myself with that question), these convictions were obviously monstrous perversions of justice and of the constitutional right to be adequately defended. Especially so, since the defendants were ignorant, poor, illiterate and young, suffered from public hostility, were under close surveillance by the military forces, communication with their friends and relatives was difficult and "they stood in deadly peril of their lives."

In the face of such shocking facts, what becomes of our much cherished "presumption of innocence" and our theory of "equality before the law?" The aggravated circumstances in these cases lend substantial support to the already popular and constantly growing impression that there is in this country, "one law for the rich and one for the poor."

If there had been functioning when these Negro boys were arraigned and tried, a Public Defender with the prestige and resources of the State behind him—and with the ability and experience to combat the power and machinery of prosecution—and with the legal duty and responsibility to properly defend his clients, an entirely different situation would have resulted.

That the United States Supreme Court ultimately vindicated the right of these defendants to a fair trial—at the instance of voluntary private groups and able counsel who prosecuted the appeal from the convictions—does not compensate for the fear and torture which the defendants underwent—particularly, if they were innocent. These defendants' rights were violated, primarily, because of their poverty, like countless others caught in the meshes of the criminal law—and unable to protect themselves.

For nearly 20 years, I have persistently urged the creation of Public Defenders by law, to represent accused poor persons. Voluntary or philanthropic legal aid will not suffice. It is deficient, in that it seeks to and does substitute charity for justice. A proper defense is a fundamental legal right—it should not be the result of favor extended by philanthropic groups or in-

dividuals, however highly motivated they may be. Voluntary legal aid, although a great improvement over the present "assigned counsel" system, is inevitably a step in the evolution toward public defense.

The Public Defender Committee of the New York State Bar Association, of which Committee I have the honor to be Chairman, reported in favor of Public Defenders to the 1932 annual meeting of that Association. By resolution, the Association approved the principle of Public Defenders, and the subject was referred to the present Commission on the Administration of Justice in the State of New York, for its serious consideration.

Public Defenders have stood the test of time and experience—both here and abroad. They are now functioning in various American communities, with efficiency and economy in the administration of justice. There is a constant drift now toward Public Defender legislation throughout the nation. Judge Seabury and the Board of City Magistrates of New York City quite recently recommended Public Defenders in their respective reports to the Appellate Division, Supreme Court.

It is significant also, that Governor Roosevelt told the writer, that he is "100% in favor of Public Defenders" and that a Bill should be passed in this State as an experimental measure, in the hope that such legislation would be as successful here as it has been elsewhere.

My Public Defender Bill will be again re-introduced at the next session of the New York legislature and there is a fair chance that it may be enacted into law.

Society owes a duty to the "under dog." All persons regardless of race, creed or purse, are entitled to a fair trial and to competent counsel. Even the professional "crook"—or the habitual criminal—is entitled to a "square deal" in the Courts. How much more important is it, that an accused person should not suffer injustice, solely because of his poverty.

Judge Sutherland's opinion is a beacon light, illuminating the way toward a proper public appreciation of the right of accused poor persons to a fair trial, especially when this right is challenged by public hostility and local prejudice.

MAYER C. GOLDMAN.

New York, Nov. 11, 1932.

A New Mexican Protest Against And/Or

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The much disputed phrase found its way into the New Mexico Statutes in 1931, where, in Chapter 156, an act relating to Interpleader, the following is found:

"Sec. 2. In any such proceeding for substitution of defendants, the court, if it directs such interpleader or substitution of defendants, may thereafter allow a reasonable attorney's fee, together with costs, to the party instituting such proceedings, to be taken out of the subject-matter of the action *and/or* to be paid by the losing claimant."

If this helps to clarify the meaning of the law then a lump of mud thrown into the water helps to clarify the pool.

Hillsboro, N. M. EDWARD D. TITTMANN.

Crime News in Newspapers

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

I have read with interest the article in the January issue of the JOURNAL by Judge Yankwich entitled "Sensationalism in Crime News" in which he reports on an investigation carried on in 1928 in the School of Journalism in the University of Oregon to determine the proportionate amount of space given to crime and sensational news in the newspaper of today. It appears from the article that the result of that study was to show that crime occupied about 3.4% of the editorial space in a certain group of representative newspapers, and only about 1.4% including advertising.

These figures were startling to me, as they must have been to other readers, as I had assumed that the percentage would run much higher than that. It took me a day or two to figure out what was wrong. It is my conclusion that the small percentage is due to the fact that the total "editorial space" of which the crime news is such a small percentage, must have included those many pages of every newspaper containing matter which is not generally considered under the heading of "news items," viz., the stock market pages, the sporting pages, the women's pages, "advice to the lovelorn," etc. I think that a much better test, if we are to determine how crime is thrown at the readers by newspapers, would be to find the percentage of space on the front page of each of those newspapers which, in a given year, is devoted to crime and sensational news.

I wonder if the same School of Journalism or some other School of Journalism might not ascertain for the benefit of the public answers to the following questions:

1. What percentage of the front page space of the newspapers in the same group was in the same year, 1928, devoted to sensational material as defined in the investigation reported on by Judge Yankwich?

2. During that year what proportion of front page headlines was used by the same newspapers in calling attention to sensational material?

3. Giving headlines a weighted average, on the assumption that there are certain readers who are attracted only by headlines (the amount of weight to be given to headlines being left to the investigators), what would be the proportion of front page space devoted to sensational material?

JOHN E. TRACY.

University of Mich. Law School, Jan. 10.

"A Topsy-Turvy Appellate System"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In the last paragraph of the very interesting article of James Craig Peacock, Esq., in the January, 1933, number, "An Anomalous Appellate System," he says,

"Thus it is perfectly possible there may eventually be two appeals from the same judgment to two different appellate courts."

This has already happened. In Ohio & Big Sandy Coal Company and United Thacker Coal Company v. Commissioner, 15 B. T. A. 273, the facts were that these two corporations had originally filed separate returns for 1917, one with the Collector at Portland, Maine, the other with the Collector at Richmond, Virginia. The Commissioner found that the corporations should have filed one consolidated return and determined a deficiency accordingly. Each company filed an appeal with the Board of Tax Appeals. Such appeals were substantially identical, and they were consolidated for hearing by stipulation and only one record was made. The Board handed down one decision, and entered separate judgments. From these judgments each company appealed. The Ohio & Big Sandy Company appealed to the Fourth Circuit, and the United Thacker Company appealed to the First Circuit. The appeal petitions, the printed records and the petitioners' briefs were substantially identical in each case. Each petitioner raised some seven errors.

The Fourth Circuit case came on to be heard first, and that court expunged substantially all the deficiency by its decision reversing the Board on a complicated question of invested capital. That court held, however, that the two corporations were affiliated, notwithstanding the petitioner's complaint in that regard. Its decision is reported at 43 Fed. (2) 782.

When the other appeal came on to be heard in the First Circuit the opinion of the Fourth Circuit on the same record and the same questions was already in hand. However, the First Circuit Court did not find it necessary to adjudge the invested capital question because it held that the two corporations never were affiliated, despite the opinion of the Fourth Circuit that they were. The effect of the First Circuit decision was to expunge substantially all of the deficiency of the appellant there. The First Circuit Court did not in its opinion advert to the contrary opinion of the Fourth Circuit on the same question and on the same record, 46 Fed. (2) 231. The government did not ask for certiorari in either case, although of course the writ probably would have been granted as of course, because of the lack of agreement of the two courts in respect to two questions in what was essentially the same case.

LYLE T. ALVERSON.

New York, Jan. 11.

Diversity of Citizenship and Municipalities

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The article of Mr. Charles N. Campbell, appearing in the last issue of the JOURNAL, entitled "Is Swift vs. Tyson an Argument For or Against Abolishing Diversity of Citizenship Jurisdiction?" is very interesting.

Recently, appearing for our City, I instituted an action in our State Court against a New York Corporation. An application was made to remove the action to the Federal Court because of diversity of citizenship. I opposed the application on the ground that diversity of citizenship presupposed citizenship of the parties to the action, and that the City of Long Branch, a municipality, was not a citizen within the meaning of this clause, and, therefore, the defendant was not entitled to remove the action, but our State Court ordered the removal. I found very few authorities touching the Status of Municipalities.

THOMAS P. MCKENNA.

Long Branch, N. J., Dec. 20, 1932.

More Committee Appointments

A LIST of President Martin's committee appointments, with the exception of the members of the Committee on State Legislation and of the recently created Auxiliary Committee to Assist the Committee on Change of Date of Presidential Inauguration, was printed in the January issue of the JOURNAL. Since that date the membership of the remaining two committees has been completed. It is as follows:

State Legislation

ALABAMA—Clopper Almon, Sheffield National Bank Bldg., Sheffield; H. F. Crenshaw, Bell Bldg., Montgomery.

ALASKA—Harry F. Morton, Anchorage; Simon Hellenthal, Juneau.

ARIZONA—James R. Malott, c/o Morris & Malott, Globe; Gene S. Cunningham, Title & Trust Bldg., Phoenix.

ARKANSAS—Henry M. Armistead, 901 Southern Trust Bldg., Little Rock; Harvey T. Harrison, 1025 Southern Trust Bldg., Little Rock.

CALIFORNIA—Alfred L. Bartlett, A. G. Bartlett Bldg., Los Angeles; J. W. S. Butler, P. O. Box 1114, Sacramento.

COLORADO—George C. Manly, Patterson Bldg., Denver; S. Arthur Henry, Midland Savings Bldg., Denver.

CONNECTICUT—Lawrence A. Howard, 750 Main St., Hartford; Ralph Olney Wells, 750 Main St., Hartford.

DELAWARE—Arthur G. Logan, Delaware Trust Bldg., Wilmington; Charles C. Keedy, Industrial Trust Bldg., Wilmington.

DISTRICT OF COLUMBIA—Leo. P. Harlow, 1331 G Street, N. W., Washington, D. C.; Howard S. LeRoy, Hibbs Bldg., Washington, D. C.

FLORIDA—F. P. Fleming, Barnett National Bank Bldg., Jacksonville; R. A. Henderson, Jr., Collier Bldg., Fort Myers.

GEORGIA—Philip H. Alston, Cit. & So. Bk., Bldg., Atlanta; Henry B. Brennan, 214 East Taylor St., Savannah.

HAWAII—Arthur Withington, Castle & Cooke Bldg., Honolulu; Heaton Luse Wrenn, Hawaii Bank Bldg., Honolulu.

IDAHO—Jess B. Hawley, Box 1617, Boise; Pasco B. Carter, Box 1638, Boise.

ILLINOIS—Frank T. Miller, Peoria Life Bldg., Peoria; R. Allan Stephens, 714 First National Bank Bldg., Springfield.

INDIANA—George O. Dix, 1002 Citizens Trust Bldg., Terre Haute; Samuel Parker, 811-12 J. M. S. Bldg., South Bend.

IOWA—George E. Hise, 1115 Bankers Trust Bldg., Des Moines; Seth Thomas, 606 Snell Bldg., Fort Dodge.

KANSAS—David E. Palmer, New England Bldg., Topeka; Fred Robertson, 428 Brotherhood Block, Kansas City.

KENTUCKY—Kathleen Mulligan, Security Trust Bldg., Lexington; Thomas S. Waller, 611 City National Bank Bldg., Paducah.

LOUISIANA—H. Payne Breazeale, Triad Bldg., Baton Rouge; Allen J. Ellender, Bank of Terrebonne Bldg., Houma.

MAINE—Leonard A. Pierce, 903 Fidelity Bldg., Portland; Robert B. Williamson, Augusta Trust Bldg., Augusta.

MARYLAND—William P. Cole, Jr., Towson; R. Bennett Darnall, Fidelity Bldg., Baltimore.

MASSACHUSETTS—Herbert Parker, 910 Barristers Hall, Boston; Frederick W. Mansfield, 18 Tremont St., Boston.

MICHIGAN—John M. Dunham, Grand Rapids Nat'l Bank Bldg., Grand Rapids; Fred G. Dewey, 2005 Dime Bank Bldg., Detroit.

MINNESOTA—Pierce Butler, Jr., 1005 Merchants Nat'l Bank Bldg., St. Paul; Thomas M. McCabe, Torrey Bldg., Duluth.

MISSISSIPPI—W. L. Guice, First National Bank Bldg., Biloxi; Gerard H. Brandon, 703 North Union, Natchez.

MISSOURI—Roy D. Williams, Booneville; John T. Barker, Scarritt Bldg., Kansas City.

MONTANA—Edmond G. Toomey, Securities Bldg., Helena; William J. Jameson, Jr., Electric Bldg., Billings.

NEBRASKA—Frederick S. Berry, Berry Bldg., Wayne; Edward R. Burke, First National Bank Bldg., Omaha.

NEVADA—G. J. Kenny, Woodliff Bldg., Fallon.

NEW HAMPSHIRE—Conrad E. Snow, Rochester Trust Co. Bldg., Rochester; Harry F. Lake, 77 North Main Street, Concord.

NEW JERSEY—Harry R. Coulomb, Schwehm Bldg., Atlantic City; J. Henry Harrison, 810 Broad St., Newark.

NEW MEXICO—Carl H. Gilbert, A. B. Renehan Bldg., Santa Fe; Francis C. Wilson, Salmon Bldg., Santa Fe.

NEW YORK—Eugene Raines, Terminal Bldg., Rochester; Chauncey B. Garver, 55 Wall St., New York City.

NORTH CAROLINA—Julius C. Smith, Jefferson Standard Bldg., Greensboro; G. V. Cowper, Court House, Kinston.

NORTH DAKOTA—V. R. Lovell, Fargo; Sidney D. Adams, Lisbon.

OHIO—E. Searles Morton, 42 E. Gay St., Columbus; James M. Linton, 3230 A. I. U. Bldg., Columbus.

OKLAHOMA—Frank Wells, Commerce Exchange Bldg., Oklahoma City; Joseph C. Stone, 1010-13 Barnes Bldg., Muskogee.

OREGON—Richard W. Montague, Yeon Bldg., Portland; Arthur K. McMahan, First National Bank Bldg., Albany.

PENNSYLVANIA—George Ross Hull, P. O. Box 26, Harrisburg; John H. Fertig, Legislative Reference Bureau, Harrisburg.

PHILIPPINE ISLANDS—Julian A. Wolfson, Pacific Bldg., Manila; Robert E. Manly, Naga, Camarines Sur.

PUERTO RICO—Ismael Soldevila, 87 Allen St., San Juan; Jose Tous Soto, Ponce.

RHODE ISLAND—Albert A. Baker, New Industrial Trust Bldg., Providence; George H. Huddy, Jr., 111 Westminster St., Providence.

SOUTH CAROLINA—M. A. Wright, Spivey Bldg., Conway; Albert C. Todd, American Bank Bldg., Greenwood.

SOUTH DAKOTA—M. Q. Sharpe, Kennebec; George A. Rice, Flandreau.

TENNESSEE—J. C. Edwards, Fourth & First Nat'l Bank Bldg., Nashville; Harley G. Fowler, Hamilton Bank Bldg., Knoxville.

TEXAS—O. O. Touchstone, Magnolia Bldg., Dallas; John L. Darrouzet, American Nat'l Ins. Bldg., Galveston.

UTAH—Robert L. Judd, 409 Kearns Bldg., Salt Lake City; Dean F. Brayton, 1324 Second Avenue, Salt Lake City.

VERMONT—J. Ward Carver, Quarry Bank Bldg., Barre; George L. Hunt, 43 State St., Montpelier.

VIRGINIA—Murray M. McGuire, Mutual Bldg., Richmond; J. Gordon Bohannan, National Bank Bldg., Petersburg.

WASHINGTON—Clarence R. Innis, Hoge Bldg., Seattle.

WEST VIRGINIA—Frank W. Nesbitt, Riley Law Bldg., Wheeling; Clifford R. Snider, Empire Bldg., Clarksburg.

WISCONSIN—Carl B. Rix, 833 Wells Bldg., Milwaukee; William D. Thompson, 526 Monument Square, Racine.

WYOMING—Thomas Hunter, Majestic Bldg., Cheyenne; William E. Mullen, Hynds Bldg., Cheyenne.

Auxiliary Committee to Assist Committee on Change of Date of Presidential Inauguration

ALABAMA—William McM. Rogers, 2100 Age-Herald Bldg., Birmingham.

ARIZONA—Dudley W. Windes, 508 Title & Trust Bldg., Phoenix.

ARKANSAS—Edward B. Downie, 919 Rector Bldg., Little Rock.

CALIFORNIA—William H. Donahue, Oakland Bank Bldg., Oakland.

COLORADO—Mary F. Lathrop, Equitable Bldg., Denver.

CONNECTICUT—Edward M. Day, P. O. Box 1394, Hartford.

DELAWARE—George N. Davis, 904 Market St., Wilmington.

FLORIDA—R. F. Maguire, P. O. Box 1014, Orlando.

GEORGIA—John M. Slaton, Grant Bldg., Atlanta.

IDAHO—Thomas E. Buckner, Caldwell State Bank Bldg., Caldwell.

ILLINOIS—Franklin L. Velde, Zerekh Bldg., Pekin.

INDIANA—Louis B. Ewbank, 1311 Fletcher Sav. & Trust Bldg., Indianapolis.

IOWA—Thomas J. Guthrie, 902 Register & Tribune Bldg., Des Moines.

KANSAS—John S. Dawson, Supreme Court, Topeka.

KENTUCKY—H. H. Tye, Williamsburg.

LOUISIANA—Wylie M. Barrow, Raymond Bldg., Baton Rouge.

MAINE—Frank D. Marshall, 120 Exchange St., Portland.

MARYLAND—Robert R. Carman, Maryland Trust Bldg., Baltimore.

MASSACHUSETTS—George R. Stobbs, 820 Slater Bldg., Worcester.

MICHIGAN—Walter S. Foster, P. O. Box 103, Lansing.

MINNESOTA—James D. Shearer, 654 Security Bldg., Minneapolis.

MISSISSIPPI—W. W. Venable, McWilliams Bldg., Clarksdale.

MISSOURI—James E. King, Boatmen's Bank Bldg., St. Louis.
MONTANA—Lew L. Callaway, The Capitol, Helena.
NEBRASKA—Francis P. Matthews, Insurance Bldg., Omaha.
NEVADA—Robert Z. Hawkins, United Nevada Bank Bldg., Reno.
NEW HAMPSHIRE—Leslie P. Snow, Rochester Trust Bldg., Rochester.
NEW JERSEY—Ralph E. Lum, 605 Broad Street, Newark
NEW MEXICO—Clarence M. Botts, First National Bank Bldg., Albuquerque.
NEW YORK—Paul S. Andrews, 311 S. A. & K. Bldg., Syracuse.
NORTH CAROLINA—J. M. Broughton, 401 Citizens Bank Bldg., Raleigh.
NORTH DAKOTA—Melvin A. Hildreth, 300 South 8th Street, Fargo.
OHIO—Henry B. Street, St. Paul Bldg., Cincinnati.
OKLAHOMA—John F. Sharp, Jr., Braniff Bldg., Oklahoma City.
OREGON—Oscar Hayter, Dallas.
PENNSYLVANIA—William A. Schnader, 1930 Land Title Bldg., Philadelphia.
PUERTO RICO—J. Henri Brown, Bank of Nova Scotia Bldg., San Juan.
RHODE ISLAND—Albert A. Baker, Industrial Trust Bldg., Providence.
SOUTH CAROLINA—Christie Benet, 1207 Nat'l Loan & Exchange Bk. Bldg., Columbia.
SOUTH DAKOTA—George Philip, Box 607, Rapid City.
TENNESSEE—Walter Chandler, Sterick Bldg., Memphis.
TEXAS—Palmer Hutcheson, Esperson Bldg., Houston.
UTAH—Dean F. Brayton, 1324 Second Avenue, Salt Lake City.
VERMONT—Lawrence C. Jones, Service Bldg., Rutland.
VIRGINIA—Armistead M. Dobie, Colonnade Club, University.
WASHINGTON—Frank T. Post, Exchange National Bldg., Spokane.
WEST VIRGINIA—Robert S. Spilman, Box 1390, Charleston.
WISCONSIN—Edward J. Dempsey, First National Bank Bldg., Oshkosh.
WYOMING—Lawrence E. Armstrong, Rawlins.

Deaths of Members Reported

The Secretary's Office reports that news has been received of the death of the following members:

Levi Cooke, an active member of the Association for twenty-one years, and one of the outstanding lawyers of the National Capital, died at his home at Washington, D. C., on Dec. 24, 1932. His most conspicuous work for the Association was as chairman of the Committee on Change of Date of the Presidential Inauguration, a task which was crowned with success just before his death. Among the honors which came to him professionally was his appointment by the U. S. Supreme Court as master in a case involving a natural gas controversy between Pennsylvania and Ohio on one side and West Virginia on the other. Mr. Cooke had had a successful newspaper career before entering the practice of law at Washington. During the recent meeting of the Association in that city he was chairman of the Committee on Entertainment. He is survived by a wife and two daughters. President Martin appointed the following committee to represent the Association at his funeral: George P. Hoover, John Marshall, Ralph Van Orsdel, Leo P. Harlow and William R. Vallance.

Hazen I. Sawyer, of Keokuk, Iowa, a member of the American Bar Association for more than thirty years, died in South Orange, N. J., on December 10th. Mr. Sawyer was a member of the Commissioners on Uniform State Laws and the American Law Institute. Many fine tributes to his character and ability were paid in memorial services held by the Keokuk Bar Association. President Martin appointed the following committee to represent the Association at his funeral: James S. Burrows, James A. Hollingsworth, E. W. McManus, all of Keokuk, Iowa.

John P. Weissenhagen, of Detroit, Mich., a member of the Association for the past ten years.

John S. Stone, Birmingham, Ala., a member of the Association for the past ten years, on July 28, 1932.

Howard S. McCandlish, of Marion, S. C., a member of the firm of Lide & McCandlish, on Oct. 8, 1932. Mr. McCandlish joined the Association in 1927.

L. Newton Wylder, of Kansas City, Mo., who joined the Association in 1920, on July 26, 1932.

John H. Cantrell, of Chattanooga, Tenn., on October 18, 1932. Mr. Cantrell had been a member for more than twenty years.

Mr. J. Porter Russell, a member of the firm of Russell, Houston & Russell, of Boston, Mass., on Sept. 26. Mr. Russell joined the Association in 1911.

Charles A. Houts, of St. Louis, Mo., a member since 1916, in August, 1932.

Hon. Neill B. Field, of Albuquerque, N. M., who joined the Association in 1911, on Oct. 28.

George C. Steinemann, of Sandusky, Ohio, on November 9. Mr. Steinemann had been a member for nearly twenty years.

Timothy J. Scofield, of Chicago, Ill., on October 4, 1932. Mr. Scofield had been a member for the past twelve years.

Robert J. Fisher, of Washington, D. C., a member of the Association for the past thirty years, on Nov. 10, 1932.

John Dymond, Jr., a member of the firm of Dymond & Levy, of New Orleans, La., in November, 1932. Mr. Dymond became a member of the Association in 1911.

Wilmot M. Odell, of Fort Worth, Tex., on Nov. 14, 1932. Mr. Odell had been a member for the past eight years.

Frank C. McGirr, of Pittsburgh, Pa., who joined the Association twenty years ago, on Oct. 30, 1932.

Ray C. McAllaster, of Los Angeles, Calif., on September 18, 1932. Mr. McAllaster had been a member for the past ten years.

Hon. William S. Kirkpatrick, of Easton, Pa., a member since 1914, on Nov. 3.

William F. Woerner, of St. Louis, Mo., on June 27, 1932. Mr. Woerner had been a member for more than twenty years.

Hon. William D. R. Ainey, of Harrisburg, Pa., long a member of the Association, on Sept. 4, 1932.

Hon. John Proctor Clarke, New York City, a member for the past five years, in the month of January, 1932.

F. G. James, senior member of the firm of F. G. James & Son, Greenville, N. C., on July 1, 1932. Mr. James had been a member for the past seventeen years.

Ralph B. Williamson, of Washington, D. C., a member for the past ten years, on December 10, 1932.

L. R. Geisenberger, of Lancaster, Pa., who became a member in 1924, on Nov. 20, 1932.

John J. Wood, Berlin, Wis., on May 15th. Mr. Wood had been a member of the Association for twenty years.

Harold Elno Smith, of Cleveland, Ohio, on July 30, 1932. Mr. Smith joined the Association in 1926.

Cyrus F. Small, of Caribou, Maine, August 2, 1932.

Jacob Samuels, of San Francisco, Calif., who had been a member for the past ten years, on July 17, 1932.

Elmer E. Rodabaugh, of San Diego, Calif., on March 10, 1932. Mr. Rodabaugh had been a member for the past five years.

Russell K. Ramsey, of Sandusky, Ohio, a member since 1921, on February 20, 1932.

William H. Price, of Miami, Florida, on April 4, 1932. Mr. Price had been a member for the past twenty-six years.

Saul Praeger, of Cumberland, Maryland, on August 9, 1932. Mr. Praeger joined the Association ten years ago.

Hugh N. Parker, Flint, Michigan, a member since 1930, on March 6, 1932.

Hon. T. G. Norris, of Prescott, Arizona, who joined the Association in 1919, on May 23, 1932.

Hon. Alfred W. Mueller, of New Ulm, Minn., on August 1, 1932. Mr. Mueller had been a member since 1923.

Roscoe R. Mitchell, of Buffalo, N. Y., a member since 1923, on June 15th.

William O. Meilahn, of Milwaukee, Wis., a member since 1929, on August 18, 1932.

Hon. Charles J. Martin, of New Haven, Conn., a member for the past eighteen years.

J. Sprigg McMahon, Dayton, Ohio, a member for the past thirty-three years, on December 15, 1931.

Henry W. Lueders, of Tacoma, Wash., on July 30th. Mr. Lueders joined the Association in 1908.

Judge Charles A. Hitchcock, of Syracuse, N. Y., a member since 1927, on November 4th.

Frederick T. Henry, of Denver, Col., who joined the Association in 1925, on February 16th.

Harry G. Keats, on September 27, 1932. Mr. Keats joined the Association in 1932.

Charles S. Thornton, of Chicago, Ill., on October 24th. Mr. Thornton joined the Association in 1896.

C. O. Baldwin, of Duluth, Minn., on September 10th. Mr. Baldwin had been a member for the past ten years.

A. Hershfield, of New York City, on July 21st last. Mr. Hershfield joined the Association in 1922.

California

Fifth Annual Meeting of State Bar of California—Confidence Expressed in State Board of Bar Examiners—Dean Bates of Michigan Delivers Morrison Foundation Lecture—Various Resolutions Adopted

The Fifth Annual Meeting of the State Bar of California was held at Coronado Beach on Sept. 29, 30 and Oct. 1, 1932. The following details of the event are taken from The State Bar Journal of November

With an attendance of upwards of 400 lawyers from all parts of the State at the opening session, the fifth annual convention of The State Bar of California got under way at Coronado on September 29, with President Peter J. Crosby, of Oakland, presiding.

Addresses of welcome were delivered by D. H. Cameron, councilman of Coronado, Mayor John F. Forward of San Diego and President Walter Ames of the San Diego County Bar Association.

Following the addresses of welcome, President Peter J. Crosby delivered his annual address. He reviewed the conditions leading up to the organization of The State Bar and paid a tribute to the late Jeremiah F. Sullivan for the work that he had done to bring about the establishment of this state agency for the control of the legal profession.

President Crosby discussed the admissions problem at length and pointed out the necessity of students having at least the educational background provided by the State Bar Act before being permitted to matriculate in any law school and the duty of law schools to stress to the intending law student the necessity of good moral character if he expects to be admitted.

He commented upon the disciplinary activities of the Board of Governors and its unfortunate necessity, condemned the activities of "ambulance chasers" and other persons, legal and lay, engaging in unlawful practices tending to make a "racket" of certain types of legal work, and admonished those engaging in such demoralizing practices to abandon them and assist in exalting rather than debasing the bar.

President Crosby outlined the activities of lay agencies in various phases of unlawful practice of the law and assailed the banks and trust companies that advertise for trust business and for their selection as executors and trustees, as the chief offenders.

At the opening of the afternoon session the report of the canvass of ballots in the recent election for members of the Board of Governors was presented and the result of the election was declared. The newly elected members of the Board were sworn in by Mr. Chief Justice William H. Waste of the Supreme Court of California.

Vice-President Edward I. Barry, of San Francisco, then assumed the chair to preside over the afternoon session. The Chairman called upon Governor

GUY RICHARDS CRUMP
President California State Bar

Eugene Daney, of San Diego, to introduce the speaker of the afternoon, Hon. John H. Clarke, former justice of the Supreme Court of the United States.

Former Justice Clarke reviewed the methods of the Supreme Court of the United States in considering and disposing of cases. He admonished members of the bar who contemplate invoking the assistance of that tribunal, to be sure of the jurisdiction and to be certain as to the facts; to assume that the court knows something of the law of the case and nothing of the facts involved. He advised against undue eloquence and unduly long arguments on the part of counsel, advocating limitation of arguments in the interest of clarity and expedition.

The speaker closed his most interesting address with an appeal to the bar of California to bring pressure to bear for the ratification by the Senate of the treaties that will make possible the entrance of the United States into the World Court, declaring that "our national honor and our national interests are at stake in this matter."

Following the address of former Justice Clarke, which was enthusiastically applauded, the report of the Committee of Bar Examiners was presented and ordered filed.

James E. Brenner, research secretary of the Committee of Bar Examiners, delivered an address on "The State Bar Economic Survey of Attorneys Admitted During the Past Three Years."

Mr. Brenner was followed by Alfred L. Bartlett, chairman of the Committee of Bar Examiners, who, in a ringing and convincing address, placed the case of the Bar Examiners before the convention. Mr. Bartlett outlined the procedure of the Bar Examiners and pointed out the necessity for greater care in the admission of students to the bar, declaring that it was not the wicked so much as the ignorant that brought opprobrium upon the bar. He said that the work of the Committee of Bar Examiners presented only half the picture; the other half was presented by the law schools. He closed his address with a plea for a thorough survey of the entire problem of examinations and of the law schools for the purpose of determining just what the student might expect from any one of the schools in the matter of preparation for admission to the bar.

Joseph J. Webb, of San Francisco, presented the report of the Committee on Cooperation between The State Bar and the Law Schools, and presented a resolution for making a survey of the law schools in California, which was adopted unanimously.

Robert L. McWilliams, of San Francisco, Chairman of the Conference of California Law School Instructors, presented a resolution, providing for the holding of but one examination for admission a year. This resolution provoked considerable discussion, but, upon being put, was adopted by a large majority.

Amid prolonged applause a rising vote of thanks was given to Chairman Alfred L. Bartlett of the Committee of Bar Examiners and to James E. Brenner, research secretary of the committee, for their outstanding work. Rollin L. McNitt, of Los Angeles, Dean of Southwestern University School of Law, then offered a resolution expressing the convention's complete confidence in the Committee of Bar Examiners and its methods of conducting the bar examinations in this State, which was adopted.

The evening session, for the purpose of hearing Dean Henry M. Bates of the University of Michigan Law School deliver the Alexander F. Morrison Foundation Lecture on "Trends in American Government," opened at 8 o'clock with Governor J. W. Hawkins, of Modesto, himself a graduate of Ann Arbor, presiding and introducing the speaker.

Dean Bates outlined governmental trends in this country since the adoption of the Constitution, and in concluding pointed out what he considered the principal troubles with present-day government: "In brief, I venture to say that of the failures of our government to function satisfactorily as alleged in contemporary discussion, the following conclusions cannot be successfully controverted: First, governmental operation of business or industry which can be properly confided to private individuals can be halted if it is desired so to do. Secondly, as to the continued increase in the volume of our law, both legislative and judicial, and as to the further administrative law and action, there can be no reversal of the present trends as long as the conditions of life remain substantially as they are today."

Following Dean Bates' address, which was heartily applauded, the convention resumed its business session, taking up

for discussion the report of the Committee on Reapportionment, which was presented by Chairman Charles A. Beardsley, of Oakland. The new apportionment for the election of members of the Board of Governors recommended by this committee was adopted.

The report of the Committee on Anti-Trust Laws of California was presented by Prof. Robert E. Stone, of the University of California. Proposed amendments provide for the submission of business agreements to the Railroad Commission, which is given power to either disapprove or sanction trade agreements. The convention declared that The State Bar refused either to approve or disapprove the legislation suggested by the Committee and ordered the report filed with the secretary.

The morning session of Friday, September 30, opened with Vice-President Jesse W. Carter, of Redding, in the chair. In opening the session Vice-President Carter pointed out that the State Bar Act imposed upon The State Bar the duty of improving the administration of justice and advancing the science of jurisprudence. The work of the Sections was designed to further the fulfillment of those obligations, he said, introducing former Governor O. K. Cushing, of San Francisco, chairman of the Section Committee, who reviewed the work of the Committee and outlined its purposes.

Prof. Evan Haynes, Research Director, commented upon the work carried on during the present year and upon the result of the recent plebiscite. The appellate problem is more simple, he said, by comparison, than the problem of congestion in the trial courts; it is less difficult and less extensive, and more likely to be settled within a reasonable time.

Professor Haynes then outlined the work that is now being carried on at the three law schools. California is devoting its activities to appellate procedure and selection, tenure and retirement of judges; Stanford to the procedure in the various States between the time that the parties rest and the record on appeal is filed; venue and jurisdiction of courts; and differences in the procedure in the superior and inferior courts; while Southern California is giving attention to an exhaustive study of trial by jury and the special verdict.

O. K. Cushing, of San Francisco, presented a resolution setting out that the public interest requires that the vacancy existing in the United States Circuit Court of Appeals for the Ninth Circuit, by reason of the death in May, 1931, of Hon. Frank H. Rudkin, be filled without further delay; calling upon Congress to provide a fourth member of the Court of Appeals for the Ninth Circuit, and requesting the Board of Governors to appoint a committee to assist in the accomplishment of the purposes of the resolution. The resolution was adopted.

Discussion of the reports of the Section Committee and Research Department, with particular reference to the plebiscite and form of statements accompanying the plebiscite, resulted in the adoption of the following resolution: "Resolved, That hereafter, when matters are submitted to the membership for poll, they be accompanied by summary of arguments, prepared by persons appointed by the Board of Governors, favoring and opposing the respective measures, and that there be appended to such summaries, references to any articles which may appear in the State Bar Journal, or elsewhere, dealing with such subjects upon which the bar is being interrogated."

A luncheon meeting under the direction of the younger lawyers' groups of the State was held at 12:30 o'clock. President Peter J. Crosby presided and short addresses were delivered by Lowell Mathey, president of the Junior Committee of the Los Angeles County Bar Association; Gordon Johnson, chairman of the Board of Directors of the Barristers' Club of San Francisco; Carlyle Crosby, representing the Lawyers' Club of Oakland, and Fred Kunzel, representing the younger lawyers of San Diego. The young men spoke of the contribution that the members of their groups were desirous of making to the welfare of the legal profession and of their interest in maintaining the high standards set by the older practitioners. At the speakers' table, with President Crosby, were Hubert Morrow, of Los Angeles; Charles A. Shurtleff, San Francisco; Ewell D. Moore, Los Angeles, and Robert P. Jennings, president of the Los Angeles County Bar Association.

Hectic oratory marked the afternoon session, set apart by the Board of Governors as an "open forum" for the discussion of resolutions relating to problems of importance to The State Bar. Vice-President Guy R. Crump, of Los Angeles, presided.

A resolution by Francis D. Adams, of Los Angeles, as restated by the Committee on Resolutions, providing for the appointment by the Board of Governors of a committee of three to act as a Committee on Budget and Efficiency, to recommend and supervise all appropriations and expenditures in the interest of economy, efficiency and saving, was adopted after a heated argument.

Other resolutions adopted were: Opposing the taking of photographs during a court trial and the broadcasting of court proceedings by radio or otherwise.

Advocating the amendment of Section 281 of the Code of Civil Procedure and subdivision 13 of Section 1209 thereof, to make it a contempt of court for laymen to practice law.

Demanding that no attorney who, within the past two years, had received a retainer or fee from any bank having a trust department, or from any title or trust company, should serve on any committee having to do with the unlawful practice of the law.

That a committee of five be appointed to study the methods of administration of the Workmen's Compensation Act with particular reference to the appearance of laymen in representative capacities before the Industrial Accident Commission.

A brilliant throng of judges, lawyers and their ladies gathered in the Cathedral dining-room of the Hotel Del Coronado on the night of Friday, September 30, for the annual banquet. Former Governor Roland G. Swaffield, of Long Beach, presided as toastmaster, and the speakers were Mr. Chief Justice William H. Waste, of the Supreme Court, J. W. S. Butler, of Sacramento, and Hon. C. N. Andrews, presiding judge of the Superior Court of San Diego County.

With Vice-President Guy R. Crump, of Los Angeles, presiding at the final session on Saturday, the convention took up the report of the Committee on Criminal Law and Procedure, Byron C. Hanna, of Los Angeles, chairman. Three recommendations of the Committee were approved. The first of these was as follows:

That section 925 of the Penal Code be amended so as to provide that if an indictment has been found against a defendant the transcript of the testimony given in his case before the Grand Jury shall be prepared as soon as the same can be done with diligence, and upon the completion of the preparation thereof be immediately served upon the defendant, and that such transcript shall in any event be served upon the defendant within five days after the discharge of the grand jury, or, if the grand jury has not been discharged, at least ten days before the date first set for trial.

Following a whirlwind of oratory The State Bar convention, by an overwhelming vote, approved the initiative measure on the ballot for the November election as proposition No. 3, providing that trust deeds may be foreclosed only by an action in court and permitting an equity of redemption of one year.

Colorado

Colorado Bar Association Holds Thirty-Fifth Annual Meeting—New Plan for Financing Work of Grievance Committee—Trustees for Old Age Fund Report Generous Support

The thirty-fifth annual meeting of The Colorado Bar Association convened in the Rose Room of the Antlers Hotel at Colorado Springs, on Friday, September 16, 1932, at 10 A. M. With President Mortimer Stone, of Fort Collins, in the chair, the assembly immediately began its hearing and consideration of reports from administrative officers, trustees of the old age fund, and committees, both standing and special. The latter, speaking through their respective chairmen, were: Grievances, Ernest L. Rhoads; Membership, Henry C. Vidal; Legal Education, Roger H. Wolcott; Legal Biography, Page M. Brereton; Local Bar Associations Wilbur F. Denious; Judicial Procedure, Donald C. McCreery; Legal Development, Mary F. Lathrop; Uniform State Laws and Legislation, Albert G. Craig; American Citizenship, A. Watson McHendrie; Cooperation of Press and Bar, Cass E. Herrington; Cooperation with American Law Institute, Robert G. Smith; Criminal Procedure Reform, Henry McAllister; Financing Grievance Costs, Farrington R. Carpenter; Judicial Salaries, George P. Steele; Judicial Statistics, Lawrence Lewis; Legal Aid, Charles J. Munz, and Reorganization of Judiciary, Haslett Platt Burke.

The financing of the work of the Committee on Grievances is hoped to be accomplished through the passage by the current legislature of an act establishing a Supreme Court disciplinary fund, to be used for the purpose of reg-

ulating the practice of law in Colorado. The requisite moneys therefor are to be provided through monthly transfer to the state treasurer of 1% of all penal fines received monthly by each county treasurer.

The first report by Chairman Edward Ring, of the trustees of the old age fund, showed that this plan for the care of indigent elderly lawyers had been given warm and generous support from the members of the Association and their friends. The initial encouragement of the idea has been so well sustained that the fund bids fair to become the permanent success which was the ultimate design of its foundation.

The leading feature of Friday's afternoon session was President Stone's address on Some Inherited American Traditions, which subject was treated in that scholarly, philosophical style in which Mr. Stone is so happy.

The night meeting of the 16th was devoted as a tribute to Justice John Campbell, of the Supreme Court, in appreciation of his thirty-four years of service on the Colorado bench. President Stone called upon former Supreme Court Justice and Governor Julius C. Gunter, of Denver, to preside, who in turn introduced Cass E. Herrington, reading an encomium prepared by Charles S. Thomas, kept away by illness; Henry McAllister, who spoke comprehensively on Justice Campbell and His Contributions to Colorado Law; and Justice Haslett Platt Burke, who voiced the esteem of the bench of the state. The response of Justice Campbell climaxed an eventful evening.

In the morning of Saturday, the 17th, the assemblage of members and guests heard addresses on Oral Argument, by Horace N. Hawkins, of Denver, and on The Press and the Law, by Lee Taylor Casey, of the Rocky Mountain News, Denver. In the afternoon, a symposium on Bar Examinations was shared by Deans Hamlet J. Barry of Westminster Law School, Roger H. Wolcott of University of Denver Law School, and Robert L. Stearns of University of Colorado Law School. Following came a presentment on Business Methods in the Law Office, by Ernest L. Rhoads, of Denver. The entire program of the day had been based upon intensely practical topics in professional lines, and the zealous attention of its auditors testified to its deep interest.

ERNEST L. RHOADS
President Colorado State Bar Association

Business of the convocation was closed with the election as officers of the Association for the ensuing year of President, Ernest L. Rhoads; First Vice-President, William S. Jackson, of Colorado Springs; Second Vice-President, Raymond L. Sauter, of Sterling; and Secretary and Treasurer, Harrie M. Humphreys, of Denver.

Mr. Rhoads is a recent president of The Denver Bar Association, and heads the firm of Rhoads and Seeman, of Denver. His wide popularity certifies the pleasure with which the Association placed its leadership in his hands.

The annual dinner on Saturday night evinced in its number of ladies as guests how acceptable that late innovation has become. With President Stone as toastmaster, the after-dinner speakers, Paul P. Prosser of Denver, Stanley A. Curtis of Fort Collins, Ethelbert B. Adams of Grand Junction, and the incoming President, Ernest L. Rhoads, pleased, amused and inspired.

In spite of depression's weight, the registered attendance throughout the meetings was above the average in number.

Indiana

Indiana State Bar Association Holds Mid-Winter Meeting—Final Draft of Self-Governing Bar Act Reported—Bills Creating a Judicial Council and Giving Rule-Making Power to Supreme Court Approved

The mid-winter meeting of the Indiana State Bar Association, held at Indianapolis on December 17, 1932 was presided over by President Frank H. Hatfield, of Evansville, and was well attended. Memorials to Charles M. McCabe, of Crawfordsville, a past president of the association, Judge Vinson Carter of Indianapolis, and Judge Solon Enlow, of Danville, were read and adopted.

Franklin Davidson and Attorney-General James M. Ogden, of Indianapolis, and Senator Carl Gray, of Petersburg, made interesting reports on the last meeting of the American Bar Association.

Alexander M. Bracken, of Muncie, a delegate to the International Conference on Comparative Law at The Hague last summer, delivered a very interesting address on the subject of Comparative Law. He called attention to the fact that the necessity of facing new situations always causes lawyers to turn to comparative law for light and assistance, that the international exchange of goods, investments and populations makes it imperative for each nation to know the laws and systems of laws of the other, and that "the practice of following goods and investments into foreign countries with one's own local laws as a guide to legal rights and responsibilities, only to have the foreign customer receive those goods or investments with ideas of rights and obligations under totally different laws which prevail in his country, has been a great breeder of international conflicts and misunderstandings as well as a cause of heavy financial losses. It makes for empty ships and the disruption of international good will. The same dire result follows when local self-centered and often antagonistic laws not only greet the foreigner's goods but the foreigner himself who personally visits or moves to another land."

Mr. Bracken reported that a resolution of the conference that there be established a uniform commercial code to be adopted by all the great commercial nations was defeated, on the theory that what is needed is not a uniform code the same in all countries, but for all commercial countries to adopt their own

commercial code and then for all of the countries to understand the commercial codes of the others.

Milo Feightner, of Huntington, president of the Board of Examiners for Admission to the Bar, explained the methods of holding examinations by the Board under the Act of 1931. Of 190 applicants, 93 passed and 97 failed. Of the 97 failures, 45 applicants had no college work, 11 only one year, 4 no high school work, and only 5 were graduates of an approved law school.

The Committee on Jurisprudence and Law Reform, of which George O. Dix, of Terre Haute, is chairman, was unable to make definite recommendations for relief of congestion in the Supreme and Appellate Courts because the subject requires more extensive research and study than the committee was able to make, involving as it does a study of the whole judicial system, which is the work of a Judicial Council. The report called attention to the two bills approved at the annual meeting,—one creating a Judicial Council and the other transferring the rule-making power from the legislature to the Supreme Court,—which are now a part of the association's legislative program.

The Committee on Legal Education, of which Benjamin Long, of Logansport, is chairman, reported that the dean or a member of the faculty of three of the law schools of the state are members of that committee, and that those schools not yet having an "approved" rating are bringing themselves up to that standard just as rapidly as circumstances will permit. The committee looks forward to the day when it will be practicable to require some degree of general and legal education as a prerequisite to taking bar examinations.

The Committee on Legislation, of which William Hill, of Vincennes, is chairman, recommended the procedure to be used in securing passage of the association's legislative program and the enlargement of the committee.

The Committee on Criminal Jurisprudence, of which James J. Robinson, of the faculty of the Law School of Indiana University, is chairman, recommended the enactment of the successful Ohio and Michigan statute which requires a defendant in a criminal case to give notice in advance of trial of a defense of alibi, and the statute in successful operation in ten states and the federal courts giving to the trial judges discretionary power to provide joint or separate trials for defendants jointly charged with joint felonies, and submitted proposed acts.

Unfortunately, the discussion of the report was interrupted by the noon hour and when the association reconvened so many were in attendance who had not heard these recommendations, the bills and the discussion that these recommendations were lost by a vote so close that a division was called for. The committee reported further activities, including cooperation to meet the situation in prison industries due in part to the Hawes-Cooper Act which goes into effect January 19, 1934, and the holding of a two day state-wide conference with Peace officers, which was attended by over 200, representing more than half the counties of the state.

Because of the reduced revenue of the association resulting from the business depression, the work on American Citizenship was discontinued for the present, but Samuel E. Garrison, of Indianapolis, acting chairman of the committee, submitted a report of the work to date.

Eli F. Seebit, of South Bend, vice-president of the association and ex-officio chairman of the Membership Committee, moved the admission of four new members and reported losses of membership due to the long continued depression. He reported that "the most pleasing thing about this pathetic situation is the loyalty that the old members of the Indiana Bar Association show towards this Association. We very frequently hear from them and they express the keenest regret that they find themselves in the predicament that they have to sever a connection with the Association, and it seems to be characteristic that men who have been members of this little voluntary association for a great number of years, develop a very fine affection for the men they meet here."

Albert Rabb, of Indianapolis, read the report of the Committee on Illegal Practice of Law, which recommended that the members furnish the committee with instances of illegal practice of law coming to their attention, so that the committee can furnish advice and information to local bar associations for the prevention of such illegal practices.

The Special Committee on Amendment of the Bankruptcy Act, of which Isador Kahn, of Evansville, is chairman, recommended that the Bills known as HR-9968 and S-3866 be opposed, inasmuch as any defects in the present Bankruptcy Law occasioned by changing conditions can be easily remedied by appropriate amendments.

The Special Committee to study the Bill Affecting Financial Institutions, of which Henry H. Hornbrook, of Indianapolis, is chairman, reported in considerable detail on the bill proposed by the Study Commission, approved the general plan of reorganization of banks, trust companies, loan associations and similar financial institutions, but suggested a few amendments to correct impractical features.

The report of the Committee on Young Men's Organization, submitted by John G. Biel, of Terre Haute, recommended appointment of a standing committee of six members to be designated "Young Lawyers' Committee," that the committee be given jurisdiction over students in law schools and over members of the bar for three years after admission, and be allotted a small part of each State Bar meeting.

The Committee on Reorganization of the Bar, of which Walter R. Arnold, of South Bend, is chairman, submitted the changes made by the committee and the Board of Managers in the Self-Governing Bar Act approved at the annual meeting, and was discharged with the thanks of the association for their stupendous and successful work. The final draft of the bill was ordered printed in the next issue of the Journal.

Joseph H. Igehart, of Evansville, presented a resolution pledging the assistance of the association and its members to the Governor in working out adequate and proper methods of relief to those in distress owing to the economic crisis, and drafting of new legislation if needed.

The special committee to give publicity to the proposed amendment to the constitution removing the provision entitling every voter to admission to practice law, of which Frank McHale, of Logansport, is chairman, reported on its activities, that the amendment received 440,027 affirmative votes and 236,613 negative votes, but failed of passage because not receiving the necessary 800,243 votes.

At the banquet following adjournment the newly elected judges of the Supreme and Appellate Courts and the Attorney General were introduced. Will H. Hays, of the law firm of Hays & Hays, of Sullivan, Indiana, and New York City, delivered a magnetic address on "Where Do We Go From Here," which concluded the mid-winter session.

At both the business session and banquet there was an unusually large and enthusiastic attendance.

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